1178

No. 3197

United States

Circuit Court of Appeals

For the Ninth Circuit.

1178

STEAMER AVALON COMPANY, a Corporation,
Appellant,

vs.

HUBBARD STEAMSHIP COMPANY, a Corporation, Claimant of the American Steamer "GENERAL HUBBARD," Her Engines, Boilers, Machinery, Tackle, Furniture and Cargo,

Appellee.

Apostles on Appeal.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 3197

United States

Circuit Court of Appeals

For the Ninth Circuit.

STEAMER AVALON COMPANY, a Corporation,
Appellant,

vs.

HUBBARD STEAMSHIP COMPANY, a Corporation, Claimant of the American Steamer "GENERAL HUBBARD," Her Engines, Boilers, Machinery, Tackle, Furniture and Cargo,
Appellee.

Apostles on Appeal.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index. Page

Index. Page

In the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY.

STEAMER AVALON COMPANY, a Corporation,
Libelant,

vs.

The American Steamer "GENERAL HUBBARD," Her Engines, Boilers, Machinery, Tackle, Furniture, and Cargo,
Respondent.

HUBBARD STEAMSHIP COMPANY, a Corporation,
Claimant.

Praecipe for Apostles on Appeal.

To the Clerk of the Above-entitled Court:

The libelant, Steamer Avalon Company, a corporation, having appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree of this Court entered herein, you are hereby requested to prepare and certify the apostles on appeal to be filed in said Appellate Court in due course. Said apostles on appeal are to include in their proper order and from the following pleadings, proceedings and papers on file, to wit:

1. All those papers required by Section 1 of Paragraph I of Rule IV of the Rules of Admiralty of the United States District Court of Appeals for the Ninth Circuit.

2. All pleadings in said cause, and all the exhibits annexed thereto.

3. All the testimony and other proofs adduced in the cause, including the testimony taken at the trial; all depositions taken by either party and admitted in evidence, and all exhibits introduced by either party, said exhibits to be sent up as original exhibits.

4. The opinion and decision of the Court. **[1*]**

5. The final decree and notice of appeal.

6. The assignment of errors.

Dated: June 20, 1918.

IRA S. LILLICK,
Proctor for Libelant and Appellant.

[Endorsed]: Filed Jun. 25, 1918. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. **[2]**

Statement of Clerk U. S. District Court.

PARTIES.

Libelant: Steamer Avalon Company, a corporation.

Respondent: The American Steamer "General Hubbard," her engines, boilers, etc.

Claimant: Hubbard Steamship Company, a corporation.

PROCTORS.

For the Libelant: Ira S. Lillick, Esquire, San Francisco.

For the Respondent and Claimant: Ira A. Campbell, Esquire, and McCutchen, Olney & Willard, San Francisco.

---

*Page-number appearing at foot of page of original certified Apostles on Appeal.

PROCEEDINGS.

1916.

August 1. Filed verified libel for salvage in the sum of $20,000.

Issued monition for the attachment of the above-mentioned steamer, which monition was afterwards, on August 15th, 1916, returned and filed in this office with the U. S. Marshal's Return of Service endorsed thereon. **[3]**

August 3. Filed claim of Hubbard Steamship Company, a corporation, to said steamer "General Hubbard."

Filed admiralty stipulation (bond) in the sum of $20,000 for the release of said steamer.

October 30. Filed answer of claimant.

1917.

March 26. This cause this day came on for trial, the Honorable Maurice T. Dooling, District Judge, presiding. The Court ordered that libelant be allowed to file an Amendment to libel. After hearing testimony and argument of respective proctors, it was further ordered that this cause stand submitted to the Court for decision.

Filed Libelant's amendment to libel.

Filed depositions of Jens L. Christ-

ensen and Peter Rodland, taken on behalf of libelant.

Filed depositions of Gustaf W. Johnson, Charles W. Watts and O. S. Wickland, taken on behalf of claimant.

April 12. Filed one volume of testimony taken in open court.

1918.

February 8. Filed opinion in which it was ordered that libelant recover the sum of $2,000 and costs.

25. Filed final decree.

June 25. Filed notice of appeal.

Filed bond on appeal.

July 2. Filed assignment of errors. **[4]**

In the District Court of the United States, for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,075.

STEAMER AVALON COMPANY, a Corporation, Libelant,

vs.

The American Steamer "GENERAL HUBBARD," Her Engines, Boilers, Machinery, Tackle, Apparel, Furniture and Cargo, Respondent.

Libel.

To the Honorable MAURICE T. DOOLING, Judge of the District Court of the United States, in and for the Northern District of California:

The libel of Steamer Avalon Company, a corporation, duly organized and existing under and by virtue of the laws of the State of California, owner of the steamer "Avalon," against the American steamer "General Hubbard," her engines, boilers, machinery, tackle, apparel, furniture and cargo, and against all persons lawfully intervening for their interest therein, in a cause of salvage, civil and maritime, alleges:

I.

That at all of the times hereinafter mentioned the Steamer Avalon Company, a corporation, was, and still is, a corporation, duly organized and existing under and by virtue of the laws of the State of California, with its principal place of business in the city and county of San Francisco, in said State.

II.

That at all of the times hereinafter mentioned the libelant, Steamer Avalon Company, was, and still is, the owner of the steamer "Avalon," a vessel of about 881 gross tons register, of a length of 196.9 feet, a breadth of 41 feet, a depth of 13.7 feet and a [5] five hundred fifty (550) indicated horse power; that said vessel was constructed of wood and carried a full and complete complement of officers and crew.

III.

That at all of the times herein mentioned the value of the said steamer "Avalon" was, and is, the sum of $125,000.

IV.

That libelant is informed and believes, and upon such information and belief alleges, that on or about, to wit, the 25th day of July, 1916, at 1 o'clock A. M. of said day, the steamer "General Hubbard," on a voyage bound for San Pedro, California, was in distress at a point approximately fourteeen (14) miles northeast, one-fourth east, from Cape Meares Lighthouse, in latitude 45° 22′ north, longitude 120° 21′ west, and at said time was playing her searchlights and sending up four red rocket signals and was signaling for assistance.

V.

That the said steamer "Avalon," on a voyage north to Willapa Harbor, Washington, and at a point about four miles off Cape Meares Lighthouse, perceived the said steamer "General Hubbard" and her distress signals and her danger, and then and there changed her course from her then voyage and proceeded to the said steamer "General Hubbard," and discovered said steamer to be entirely disabled, the crank-shaft of the said "General Hubbard" being broken beyond temporary repair, and at said time and place there was a heavy westerly swell and the wind freshened from the west, and the said steamer "Avalon," under difficulties, made fast her lines, or hawsers, to the said steamer "General Hubbard," for the purpose of towing the said steamer

"General Hubbard" to the port of Astoria; that the said steamer "Avalon" then proceeded to tow the said steamer "General Hubbard" to said port of Astoria, Oregon, and, on account of the strong currents at the Columbia Bar had great difficulty in [6] so towing said steamer "General Hubbard," as, by reason of the said strong currents, the said vessels were laboring heavily, and both of said vessels were, at said place, in a perilous position, and arrived at Astoria, Oregon, at about 10 o'clock P. M. Tuesday, July 25th, 1916, and at or about said time said steamer "General Hubbard" was anchored safely off, or near, Astoria, Oregon.

VI.

That at the time and place hereinbefore mentioned the master of the said steamer "General Hubbard" informed the master of the said steamer "Avalon" that said steamer "General Hubbard," was entirely disabled and unable to proceed without assistance, and requested the master of said steamer "Avalon" to assist him by towing the said steamer "General Hubbard" to, or near, Astoria, Oregon.

VII.

That the said steamer "General Hubbard" is an American steamer and her value, as libelant is informed and believes and, therefore, alleges, is about Three Hundred Thousand (300,000) Dollars.

VIII.

That the value of the cargo on said steamer "General Hubbard" at the times and places herein mentioned, as libelant is informed and believes and,

therefore, alleges, was about Twenty-five (25,000) Dollars.

IX.

That the libelant verily believes, and therefore alleges, that said service was a valuable service, for which the said libelant is entitled to the sum of Twenty Thousand (20,000) Dollars, or thereabouts.

X.

That the said steamer "General Hubbard" is now in the port of San Francisco, in the Northern District of California, and [7] within the jurisdiction of the United States, and of this Honorable Court.

XI.

That all and singular the premises are true, and within the admiralty and maritime jurisdiction of the United States, and of this Honorable Court.

WHEREFORE, libelant prays that process in due form of law, according to the course of this Honorable Court in causes of admiralty and maritime jurisdiction, may issue against the said steamer "General Hubbard," her engines, boilers, machinery, tackle, apparel, furniture and cargo, and that all persons claiming any right, title or interest in said vessel, or her cargo, may be cited to appear and answer all the matters aforesaid, and that the said steamer "General Hubbard" and her cargo, may be condemned and sold to pay the amount which shall be found due to said libelant, with interest and costs, and that it may have such other and further

relief as in law and justice it may be entitled to receive.

STEAMER AVALON COMPANY.
By W. H. WOOD, (Seal)
President.

IRA S. LILLICK,
Proctor for Libelant. [8]

State of California,
City and County of San Francisco,—ss.

W. H. Wood, being first duly sworn, deposes and says, that he is an officer, to wit, the president of the libelant herein, Steamer Avalon Company; that he has read the foregoing libel and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated on information or belief, and, as to those matters, that he believes it to be true.

W. H. WOOD.

Subscribed and sworn to before me this 1st day of August, A. D. 1916.

[Seal] T. L. BALDWIN,
Deputy Clerk U. S. District Court, Northern District of California.

[Endorsed]: Filed Aug. 1, 1916. W. B. Maling, Clerk. By T. L. Baldwin, Deputy Clerk. [9]

therefore, alleges, was about Twenty-five (25,000) Dollars.

IX.

That the libelant verily believes, and therefore alleges, that said service was a valuable service, for which the said libelant is entitled to the sum of Twenty Thousand (20,000) Dollars, or thereabouts.

X.

That the said steamer "General Hubbard" is now in the port of San Francisco, in the Northern District of California, and [7] within the jurisdiction of the United States, and of this Honorable Court.

XI.

That all and singular the premises are true, and within the admiralty and maritime jurisdiction of the United States, and of this Honorable Court.

WHEREFORE, libelant prays that process in due form of law, according to the course of this Honorable Court in causes of admiralty and maritime jurisdiction, may issue against the said steamer "General Hubbard," her engines, boilers, machinery, tackle, apparel, furniture and cargo, and that all persons claiming any right, title or interest in said vessel, or her cargo, may be cited to appear and answer all the matters aforesaid, and that the said steamer "General Hubbard" and her cargo, may be condemned and sold to pay the amount which shall be found due to said libelant, with interest and costs, and that it may have such other and further

relief as in law and justice it may be entitled to receive.

STEAMER AVALON COMPANY.
By W. H. WOOD, (Seal)
President.

IRA S. LILLICK,
Proctor for Libelant. [8]

State of California,
City and County of San Francisco,—ss.

W. H. Wood, being first duly sworn, deposes and says, that he is an officer, to wit, the president of the libelant herein, Steamer Avalon Company; that he has read the foregoing libel and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated on information or belief, and, as to those matters, that he believes it to be true.

W. H. WOOD.

Subscribed and sworn to before me this 1st day of August, A. D. 1916.

[Seal] T. L. BALDWIN,
Deputy Clerk U. S. District Court, Northern District of California.

[Endorsed]: Filed Aug. 1, 1916. W. B. Maling, Clerk. By T. L. Baldwin, Deputy Clerk. [9]

In the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,075.

STEAMER AVALON COMPANY, a Corporation,
Libelant,

vs.

The American Steamer "GENERAL HUBBARD," Her Engines, Boilers, Machinery, Tackle, Furniture and Cargo,
Respondent.

Claim.

To the Honorable, the Judges of the District Court of the United States, in and for the Northern District of California:

The claim of Hubbard Steamship Company, a corporation, to the American steamer "General Hubbard," her tackle, apparel and furniture, now in the custody of the Marshal of the United States for the said Northern District of California, at the suit of Steamer Avalon Company, a corporation, libelant, alleges:

That it, the said Hubbard Steamship Company, is the true and bona fide owner of the said American steamer "General Hubbard," her tackle, apparel and furniture, and that no other person is owner thereof.

WHEREFORE this claimant prays that this Honorable Court will be pleased to decree a restitu-

tion of the said steamer "General Hubbard" to it, the said claimant, and otherwise right and justice to administer in the premises.

HUBBARD STEAMSHIP COMPANY,
By A. B. HAMMOND, (Seal)
Its President. [10]

Northern District of California,—ss.

Subscribed and sworn to before me this first day of August, A. D. 1916.

[Seal] THOMAS J. FRANKLIN,
Deputy Clerk United States District Court, Northern District of California.

IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
Proctors for Claimant.

[Endorsed]: Filed Aug. 3, 1916. W. B. Maling, Clerk. By Thomas J. Franklin, Deputy Clerk. [11]

In the District Court of the United States, for the Northern District of California, First Division.

IN ADMIRALTY.—No. 16,075.

STEAMER AVALON COMPANY,
Libelant,

vs.

The American Steamer "GENERAL HUBBARD," Her Engines, Boilers, Machinery, Tackle, Apparel, Furniture and Cargo,
Respondent,

HUBBARD STEAMSHIP COMPANY, a Corporation,

Claimant.

Answer.

The answer of Hubbard Steamship Company, a corporation, claimant herein, to the libel of Steamer Avalon Company, a corporation, libelant herein, admits, denied and alleges as follows:

I.

Claimant admits the allegations of article I of said libel.

II.

Claimant admits the allegations of article II of said libel.

III

Answering unto the allegations of article III of said libel, claimant is not sufficiently informed with respect thereto to either admit or deny the same, and for that reason demands that proof thereof be made if the same [12] be material.

IV.

Answering unto the allegations of article IV of said libel, claimant admits the same, except that portion alleging that said steamer "General Hubbard" was in distress, which allegation it denies. It admits, however, that at the time and place said steamer "General Hubbard" was in a disabled condition through the breaking of her crank-shaft.

V.

Answering unto the allegations of article V of said libel, claimant admits that said steamer "Avalon,"

on a voyage north to Willapa Harbor, Washington, and at a point about four miles off Cape Meares Lighthouse, perceived the steamer "General Hubbard," and then and there changed her course from her then voyage, and proceeded to the said "General Hubbard," and discovered the said steamer to be disabled, the crank-shaft of said "General Hubbard" being broken beyond temporary repair, but denies that said steamer "Avalon" perceived said steamer "General Hubbard" to be in any danger or showing distress signals, and denies that she was in any danger, or entirely disabled; admits, however, that signals for assistance were sent up. Claimant denies that at said time and place there was a heavy westerly swell, or that the wind freshened from the west, or that the steamer "Avalon" under difficulties made fast her lines or hawsers to the said steamer "General Hubbard" for the purpose of towing the said steamer "General Hubbard" to the port of Astoria; admits that the said steamer "Avalon" then proceeded to tow the said steamer "General Hubbard" **[13]** to Astoria, Oregon, but denies that on account of the strong currents at the Columbia River bar, or for any other cause, had great or any difficulty in so towing said steamer "General Hubbard," and denies that by reason of said strong currents, or for any other cause, the said vessels were laboring heavily, or at all, and denies that both of said vessels were, or that either of them was, at said place, or at any other place, in a perilous position. Admits that said vessels arrived at Astoria, Oregon, at 8:25 P. M. and not 10 P. M., as al-

leged, on Tuesday, July 25, 1916, and admits that at or about said time said steamer "General Hubbard" was anchored safely off or near Astoria, Oregon.

VI.

Answering unto the allegations of article VI of said libel, claimant admits that at the time and place thereinbefore mentioned, the master of the said "General Hubbard" informed the master of the "Avalon" that said steamer "General Hubbard" was disabled and unable to proceed without assistance, and that he requested the master of said steamer "Avalon" to tow said steamer "General Hubbard" to or near Astoria, Oregon; but denies that the master of said steamer "General Hubbard" informed the master of said steamer "Avalon" that said steamer "General Hubbard" was entirely disabled in the sense that she was in any danger, and denies that said arrangements between said masters was any other than a towage service, as shown by the agreement with respect to said towage subsequently entered into by said masters at Astoria on July 25, 1916, a copy of which agreement is hereto attached, marked exhibit "A," and hereby made a part of this answer. **[14]**

VII.

Claimant admits the allegations of article VII of said libel.

VIII.

Answering unto the allegations of article VIII of said libel, claimant denies that the value of the cargo in said "General Hubbard" at the time and place in

said libel mentioned was about $25,000 or any sum in excess of $16,123.68.

IX.

Claimant denies the allegations of article IX of said libel.

X.

Claimant denies the allegations of article X of said libel.

XI.

Answering unto the allegations of article XI of said libel, claimant denies that all and singular the premises are true, but admits that they are within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Further answering unto the allegations of said libel, claimant alleges:

I.

That said steamer "General Hubbard" left the Columbia River at about the hour of six o'clock, P. M. on July 24, 1916, with a full cargo of lumber of the value of $16,123.68, on a voyage to San Francisco, and at about midnight of said day, and while approximately fourteen miles **[15]** N. E. ¼ East from Cape Meares, in latitude 45° 22′ N., longitude 120° 20′ W., said steamer's crank-shaft broke, rendering her engine useless; that the master of said steamer immediately knew that, because of said accident, it would be necessary for his vessel to be towed to port for repairs, and, not being equipped with wireless, also knew that sooner or later he would have to advise the keeper of Cape Meares Lighthouse, or a passing vessel, of his need of tow-

age assistance, and have a tug or towing steamer sent to him to make such tow; that by reason of such situation, said master shot the usual rockets calling for assistance, in the first instance, to attract the attention of said lighthouse keeper, and very shortly thereafter said master observing inshore from said "General Hubbard" the lights from a passing vessel, thereupon, again shot rockets and displayed a searchlight, and, in response thereto, the steamer "Avalon," a moderate sized steam schooner, north bound, light, came up, and, on request of the master of the "General Hubbard," after an explanation of said steamer's condition, agreed to tow said "General Hubbard" to Astoria, with the understanding that the cost of the towage was to be settled by the owners amicably, or by arbitration, if necessary. Said steamer "Avalon," after getting her hawser ready, passed the same by means of the usual heaving lines to said "General Hubbard," and at 2:25 A. M. proceeded with said "General Hubbard" for Astoria; that said vessels entered the Columbia River at about 5 P. M., and arrived in Astoria at about 8:25 P. M., where said "General Hubbard" anchored, and said steamer "Avalon" thereupon continued to the oil wharf at Astoria. **[16]**

II.

That at the time said crank-shaft broke the night was starlight, and the wind a light northwesterly breeze, with a very moderate northwesterly swell; that during the following day said swell continued to moderate, and said light wind to flatten out, until almost absolute calm weather prevailed; that no sea

of any kind whatsoever was encountered at any time during said towage, and particularly was none encountered on the Columbia River bar, notwithstanding the fact that the tide was ebbing at the time said vessels crossed in; that it was the fairest season of the year for that region, and the place at which said "General Hubbard" became disabled was in the usual track of coasting vessels; that at no time was said "General Hubbard" in any danger whatsoever.

III.

That said services were but towage services, as to the compensation for which, the masters of said steamers entered into a written agreement on board said steamer "Avalon" at Astoria, a copy of which is hereto attached, marked exhibit "A," and hereby made a part of this answer.

IV.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE claimant prays that the libel herein may be dismissed with costs, and that it may have such other and further relief as shall be deemed and equitable in the premises.

IRA A. CAMPBELL and
McCUTCHEN, OLNEY & WILLARD,
Proctors for Claimant. [17]

State of California,
City and County of San Francisco,—ss.

L. C. Stewart, being first duly sworn, deposes and says:

That he is an officer of the Hubbard Steamship Company, a corporation, claimant herein, to wit, the vice-president thereof, and as such officer makes this verification for and on behalf of said claimant; that he has read the foregoing answer, knows the contents thereof, and believes the same to be true.

L. C. STEWART.

Subscribed and sworn to before me this 21st day of October, 1916.

[Seal] FRANK L. OWEN,

Notary Public in and for the City and County of San Francisco, State of California. **[18]**

Exhibit "A" to Answer.

STEAMER "GENERAL HUBBARD"
ASTORIA, OREGON.

July 25, 1916.

To Capt. Christensen,
S. S. "Avalon,"
Astoria, Ore.

This is to certify that the steamer "Avalon," Capt. Christensen, has towed the steamer "General Hubbard" under my command from a position viz.: Cape Meares Lighthouse N. E. ¼ E., approximate distance 14 miles, Lat. 45° 22 N. Long. 120° 21′ W. to anchorage off Astoria, agreeing to leave the cost of towage to owners of both vessels to be settled amicably, or by arbitration if found necessary.

(Signed) CHAS. A. WATTS,
Master, "General Hubbard."

Witness:

(Signed) CHAS. A. KROHN, 2d Mate
"General Hubbard."

(Signed) J. L. CHRISTENSEN,
Master, S. S. "Avalon."

[Endorsed]: Service of the within answer and receipt of a copy is hereby admitted this 28th day of October, 1916.

IRA S. LILLICK,
Atty. for Libelant.

Filed Oct. 30, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. **[19]**

In the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,075.

STEAMER AVALON COMPANY, a Corporation,
Libelant,

vs.

The American Steamer "GENERAL HUBBARD," Her Engines, etc.,
Respondent.

Amendment to Libel.

Now comes libelant above named, and, by leave of Court first had and obtained, files this, its amendment to the libel on file herein, and amends paragraph III thereof, by striking out "$125,000," in line

6, of page 2 of said libel, and inserting in lieu thereof "$200,000"; and,

Amends paragraph VII, lines 18 and 19, upon page 3 of said libel, by striking out the words and figures "Three Hundred Thousand (300,000)," and inserting in lieu thereof "*Four Hundred Sixty-five* (465,000)"; and,

Amends paragraph VIII of said libel by inserting, after the word "cargo," upon line 21 of page 3 of said libel, the words "and freight."

STEAMER AVALON COMPANY,
By R. A. HISCOX,
Secretary.

IRA S. LILLICK,
Proctor for Libelant. **[20]**

State of California,
City and County of San Francisco,—ss.

R. A. Hiscox, being first duly sworn, deposes and says; that he is an officer, to wit, the secretary, of the libelant herein; that he has read the foregoing amendment to the libel on file herein and knows the contents of said amendment; that the same is true of his own knowledge, except as to those matters which are therein stated on information, or belief, and, as to those matters, that he believes it to be true.

R. A. HISCOX.

Subscribed and sworn to before me this 24th day of March, A. D. 1917.

[Seal] J. R. CORNELL,
Notary Public, in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed by Order of Court. March 26, 1917. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. **[21]**

At a stated term of the District Court of the United States, for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, State of California, on Monday, the 26th day of March, in the year of our Lord one thousand nine hundred and seventeen. Present: The Honorable MAURICE T. DOOLING, District Judge.

No. 16,075.

STEAMER AVALON COMPANY

vs.

Am. Stmr. "GENERAL HUBBARD," etc.

Minutes of Court—March 26, 1917—Trial.

(MINUTES OF TRIAL.)

This cause came on regularly this day for hearing of the issues herein. Ira S. Lillick, Esq., was present as proctor for and on behalf of libelant. Ira A. Campbell, Esq., was present as proctor for and on behalf of respondent. After hearing proctors, the Court ordered that the cause of J. L. Christensen, et al., vs. Hubbard Steamship Company, and Hammond Lumber Co., No. 16,110, be, and the same is hereby consolidated with this cause for further proceedings. Proctors for respective parties made their respective statements as to the nature of the actions herein. On motion of Mr. Lillick and over the

objection of Mr. Campbell, further ordered that libelants, be and are hereby allowed to file amendment to original libels herein. Mr. Lillick called W. S. Burnett, L. C. Stewart, R. A. Hiscox, Fred D. Parr and W. H. Wood, each of whom was duly sworn on behalf of libelants and examined, and introduced in evidence the depositions of Jens L. Christensen and Peter Rodland and certain exhibits, which were filed and marked Libelants' Exhibits Nos. 1 (Chart), and 2 (Agreement), and thereupon rested Libelant's cause. Mr. Campbell called R. A. Hiscox as a witness on behalf of respondents and A. F. Pillsbury, who was duly sworn **[22]** on behalf of respondents and examined, and introduced in evidence certain exhibits, which were filed and marked Respondents' Exhibits "A" (Report) and "B" (Agreement) and the depositions of Charles A. Watts, Gustaf W. Johnson and O. S. Wickland, and thereupon rested cause on behalf of respondents. After hearing said proctors, further ordered that this cause be submitted on briefs to be filed *in and fifteen fifteen days.* **[23]**

In the District Court of the United States in and for the Northern District of Californit, First Division.

STEAMER "AVALON" CO., a Corporation,
Libelant,

vs.

The American Steamer "GENERAL HUBBARD," Her Engines, Boilers, Machinery, Tackle, Apparel, Furniture and Cargo,
Respondent.

(Depositions of Jens L. Christensen and Peter Rodland.)

BE IT REMEMBERED, that on Monday, October 16, 1916, pursuant to stipulation of counsel hereunto annexed, at the office of Ira S. Lillick, Esq., in the Kohl Building, in the City and County of San Francisco, State of California, personally *appeared me* Francis Krull, a United States Commissioner for the Northern District of California, to take acknowledgments of bail and affidavits, etc., Jens L. Christensen and Peter Rodland, witnesses called on behalf of the libelant.

Ira S. Lillick, Esq., appeared as proctor for the libelant and Ira A. Campbell, Esq., appeared as proctor for the respondent, and the said witnesses having been by me first duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth in the cause aforesaid, did thereupon depose and say as is hereinafter set forth.

(IT IS HEREBY stipulated and agreed by and between the proctors for the respective parties that the depositions of the above-named witnesses may be taken *de bene esse* on behalf of libelant at the office of Ira S. Lillick, Esq., in the Kohl Building, in the City and County of San Francisco, State of California, on Monday, October 16, 1916, before Francis Krull, a [24] a United States Commissioner for the Northern District of California, and in shorthand by Edward W. Lehner.

It is further stipulated that the depositions, when written up, may be read in evidence by either party

on the trial of the cause; that all questions as to the notice of the time and place of taking the same are waived and that all objections as to the form of the questions are waived unless objected to at the time of taking said depositions, and that all objections as to materiality and competency of the testimony are reserved to all parties.

It is further stipulated that the reading over of the testimony to the witnesses and the signing thereof is hereby expressly waived.) [25]

Deposition of Jens L. Christensen, for Libelant.

JENS L. CHRISTENSEN, called for the libelant, sworn.

Mr. LILLICK.—Q. Captain, what is your age?

A. Forty-one.

Q. How long have you been going to sea?

A. Going on 26 years.

Q. During that time what has been your experience? In what capacities have you served?

A. Well, I have served as master for the past 17 years—going on 17 years now.

Q. Before that time what were you?

A. First officer, second officer and third officer.

Q. You are now captain of the steamer "Avalon"? A. Yes.

Q. How long have you been captain of her?

A. Four years and 15 days.

Q. Were you on board in July, when the "Hubbard" was picked up by the "Avalon"? A. Yes.

Q. Will you tell us where you were and what happened?

(Deposition of Jens L. Christensen.)

A. I was about 14 miles west northwest of Cape Meares; about 12 o'clock or 20 minutes past 12 the first officer came and called me.

Q. You say he came and called you; where were you? A. I was asleep in my room.

Q. What did you do?

A. He told me there was a steamer up to westward sending up distress rockets and playing a searchlight up in the sky; so I told him to start out for her and I would be up on the bridge in a few minutes; when I got up on the bridge she was still playing the searchlight up; we were about 3½ miles aft when I got on the bridge.

Q. Then what did you do?

A. When I got up close to him I slowed the engine down and furthermore I stopped my ship and I hailed him.

Q. What did you say?

A. I says "Captain, what can I do for you?" [26] and he says "I am broke down; can you tow me to Astoria?" I says, "Why certainly"; I says, "I will try it."

Q. Then what did you do?

A. Then I went out to the west a little bit, got my hawser and things ready and started to pick him up, get him in tow.

Q. What was the condition of the weather, Captain?

A. The wind was west northwest, a northwest swell.

(Deposition of Jens L. Christensen.)

Q. How was the "Hubbard" lying with reference to the sea?

Mr. CAMPBELL.—There is no evidence yet that there was any sea?

A. She was lying headed about west southwest; she was lying right in the trough of the sea rolling.

Mr. CAMPBELL.—Q. What was the compass heading? A. West southwest.

Mr. LILLICK.—Q. What was the condition of the sea?

A. There was a moderate swell running, northwest swell.

Q. Was it northerly or northwesterly?

A. Northwesterly.

Q. Northwesterly swell? A. Yes.

Q. How was the "Hubbard" lying with reference to that northwesterly swell?

A. She was lying in the trough of the sea.

Q. What cargo did the "Hubbard" have on her?

A. Lumber.

Q. Was there anything on her deck?

A. Yes.

Q. What?

A. About 16 feet of deck load.

Q. Do you know from what you saw whether the "Hubbard" was able to keep her head up to the sea?

A. Not the way she was lying there; she was lying in the trough of the sea and she had no means, as her engine was disabled and there were no sails—

Q. Do you know that she had no sails?

(Deposition of Jens L. Christensen.)

A. No, I do not; there were none bent; there were none on the mast.

Q. How about the wind; was there any wind?

A. There was a light breeze, west northwesterly breeze.

Q. How did you make fast to her?

A. I went up alongside of her first and steamed up ahead a little bit and I stopped my engine [27] and I gradually let my ship drop astern until I got within 30 or 40 feet astern of him—my stern from his bow—and then I threw a heaving line to him.

Q. Whose heaving line did you use?

A. I used the "Avalon's" hawser.

Q. Then he made fast, did he? A. Yes.

Q. And you started off? A. Yes.

Q. Do you remember what time it was when you made fast, Captain?

A. It must have been somewhere around 1:30, I guess; I really do not remember that exactly.

Q. Do you remember the date?

A. I do not; I can look in the log-book and tell.

Q. By referring to the log-book can you refresh your recollection? A. Yes; the 25th of July.

Q. According to the log, how does that agree with your recollection as to the time you made fast?

A. It was 2:30 when we straightened out the line, when she was made fast; the time went a little faster when I was up on the bridge than I expected.

Q. You started off and proceeded to Astoria?

A. Yes.

(Deposition of Jens L. Christensen.)

Q. What was the character of the night; was it light or dark?

A. It was a dark night; the stars were shining but there was no moon.

Q. When did you arrive off the Columbia River bar?

A. The following evening about 4:30 I was at the bell buoy.

Q. Had you had any difficulty on the way up with the "Hubbard," Captain?

A. The biggest difficulty was at red buoy No. 4 right opposite the south jetty; we laid there for about half an hour, could not make an inch of headway as there was no flood-tide; there was a heavy freshet in the river.

Q. The Columbia River was 22 feet above zero at that time, from normal; it was all run out and no run in. [28]

Q. How were your engines working at that time?

A. They were working full speed ahead all the time.

Q. Now, you say you laid there half an hour. What result, if any, did the water from the river have upon the "Hubbard"?

A. A strong tide running out.

Q. What effect did that have on the "Hubbard" as to setting her on to one side or the other?

A. It was *it* setting her southward all the time, toward the south jetty; I was heading up to the northward all the time; she was standing in that

(Deposition of Jens L. Christensen.)

direction from me; the "Hubbard" was shaping south toward the jetty.

Q. What if any danger was there connected with that particular part of the operation?

A. It would not have taken but very little and she would have gone on the south jetty, and she would have taken me with her.

Q. Did you have any cargo on board the "Avalon"?

A. No—I had a little merchandise, about 20 or 30 tons—I had nothing; coming from south she had nothing at all, no cargo.

Q. Now, you say you were there half an hour; when you finally picked up speed you went on through, did you? A. Yes.

Q. And proceeded up the river?

A. Yes.

Q. What time did she drop anchor?

A. 8:30 or 8:45; it was somewhere around that when I dropped anchor off Astoria.

Q. After you had dropped your line to the "Hubbard" what did you do with the "Avalon"?

A. We hove the hawser in then and I told the captain of the "Hubbard" I was going to Astoria, if he wanted to go up; he said, "Yes"; after we got the hawser in I went alongside the "Hubbard" and the captain came aboard my ship and we took him to Astoria.

Q. Did you have any conversation with the captain of the "Hubbard" after he had come on board the "Avalon"? A. Yes. [29]

(Deposition of Jens L. Christensen.)

Q. What was the conversation, and what did you do?

A. He signed this agreement and asked me to sign it, and I read it over carefully, and I says, "Captain, I do not see any reason why I should sign that." "Well," he says, "Captain,"—

Mr. CAMPBELL.—We object to all this; it is intended to vary the terms and conditions of a written agreement and the document speaks for itself.

Mr. LILLICK.—Q. Go on.

A. He says to me, "Well, if you think there is anything unreasonable about it you talk to your owners when you get to Willapa to-morrow and I will destroy mine and you destroy yours, and you telegraph if you think anything is wrong; but this is simply to say you have brought me to a safe anchorage."

Mr. CAMPBELL.—Is there any objection to this?

A. (Continuing.) He says, "It will be my own responsibility if the ship goes adrift now because you have brought me to a safe anchorage."

Mr. LILLICK.—Q. In speaking of this document you refer to the document I now hand you which is headed "Hubbard Steamship Company," and dated "July 25th, 1916"? A. Yes.

Q. That is your signature, Captain? A. Yes.

Mr. LILLICK.—We offer this in evidence and ask that it be marked Libelant's Exhibit 1.

(The letter is marked Libelant's Exhibit 1 and is as follows:)

Libelant's Exhibit No. 1—Towage Agreement Dated Astoria, Oregon, July 25, 1916, Chas. A. Watts to Captain Christensen.

HUBBARD STEAMSHIP COMPANY,
STEAMER "GENERAL HUBBARD."
At Astoria, Ore.,
July 25th, 1916.

c/o Capt. Christensen,
S. S. "Avalon,"
Astoria, Ore.

This is to certify that the Steamer "Avalon" Capt. Christensen has [30] towed my steamer the "General Hubbard" from a position viz: Cape Meares Light House N. E. ¼ E. approximate distance 14 miles Lat. 45° 22′ N. Long. 124° 21 W. to anchorage off Astoria. Agreeing to leave the cost of towage to owners of both vessels to be settled amicably, or by arbitration if found necessary.

CHAS. A. WATTS,
Master "General Hubbard."

Witness:
CHAS. A. KROHN,
2d Mate "Gen. Hubbard."
J. L. CHRISTENSEN."

Cross-examination.

Mr. CAMPBELL.—Q. As I understand your statement it was that the "Avalon" did not have power enough in her engines to tow the "Hubbard" aganst this current which you got at what number buoy? A. No. 4 buoy.

(Deposition of Jens L. Christensen.)

Q. Is that it?

A. You know we used all the power we had.

Q. You understood the question, Captain; you say that the "Avalon" did not have power enough?

A. The current was so heavy.

Q. As a matter of fact, the "Avalon" did not have power enough to pull the "General Hubbard" even against the current that she met in the river at buoy No. 4?

A. No.

Q. The "Avalon" was light, was she not?

A. Yes.

Q. Her machinery is in the stern?

A. Amidships.

Q. How much water was she drawing?

A. 14 feet aft.

Q. How much forward? A. Seven.

Q. 7 feet forward? A. Yes.

Q. How long is she?

A. 196 feet on the keel.

Q. What is her beam? A. 41.

Q. And her depth?

A. 13–6, I think. I would not swear to that, but I think she is; I think the wheel is 9 feet 6, if I ain't [31] mistaken, the propeller.

Q. Where is the bridge-log?

A. That is on board the ship; it is not here.

Q. Is this a true copy of the bridge-log?

A. That is a true copy of the bridge-log.

Mr. CAMPBELL.—I should like to offer the entries of the log in evidence as part of the cross-

(Deposition of Jens L. Christensen.)

examiation. I have no special desire to have the log itself go in evidence.

The following are the entries in the mate's log: "July 25, 1916: 12:30 A. M. sighted a steamer in distress; turned around and went to her assistance; 1:15 A. M. alongside steamer 'General Hubbard'; 2:30 A. M. took her in tow to Astoria; 3 A. M. full speed; pilot-house compass north northwest, bridge compass north, northwest, ½ west; moderate northwest wind, clear; northwest swell; 8 A. M. full speed; pilot-house compass northwest by north ½ north; bridge compass north northwest; moderate northwest wind, clear weather, northwest swell. 11:45, Tillamook Rock 4 points abeam; pilot-house compass northwest by north; bridge compass northwest by north ½ north.

Lt. moderate westerly wind, clear weather, northwesterly swell.

3:35 P. M. Columbia Bar; South Channel, bell buoy abeam.

8:20 P. M. dropped the 'General Hubbard' to anchor at Astoria.

9:20 P. M. docked at Union Oil Company dock for fuel oil.

10 P. M. commenced taking on oil.

10:30 finished taking oil."

Redirect Examination.

Mr. LILLICK.—Q. Captain, when the "Avalon" was proceeding toward the "Hubbard" after you had gotten up on the bridge were any other vessels in the vicinity,—do you know?

(Deposition of Jens L. Christensen.)

A. I saw one inside of me. [32]

Q. How far inside of you?

A. About 5 miles.

Q. Do you know what she was? A. No.

Q. Do you know whether or not she could see the signals that you had seen from the "Hubbard"?

A. I don't know; she did not come to us at all; in fact he was playing the searchlight up in the sky all the time.

Q. Have you any idea what the other vessel was?

A. No.

Q. What danger was there to the "Hubbard," Captain, before you got your hawser on her?

A. There was no danger except as I say, if a northwesterly gale of wind came up and she would drop her deckload and fill up with water; of course she was 14 miles from shore; and we must admit the fact that there was plenty of water to drift; she was 14 miles off shore.

Q. What effect if any would the swell have had upon her if it had increased in violence?

Mr. CAMPBELL.—As he said it would cause her to lose her deckload.

A. If she lost her deckload she might have filled up with water; that is the only thing that would have happened to her.

Mr. LILLICK.—Q. Now, as to the power of the "Avalon" do you know what her engine-power is?

A. It is 575, I think, registered, if I am not mistaken—575 horse-power; I really don't know that, to tell the truth.

[Deposition of Peter Rodland, for Libelant.]

PETER RODLAND, called for the libelant, sworn.

Mr. LILLICK.—Q. Mr. Rodland, what is your occupation? A. Marine engineer.

Q. How long have you been a marine engineer?

A. Since 1895.

Q. Were the chief engineer on the steamer "Avalon" when she picked up the "Hubbard" at sea?

A. Yes. [33]

Q. What time was it,—do you remember?

A. It is there in the log-book, July 25, 1:20 A. M.

Q. Where were you when the distress signals of the "Hubbard" were seen?

A. I was in bed at the time; it was my watch off.

Q. Your watch off? A. Yes.

Q. Were you called?

A. I waked up as soon as the engine stopped, and came out.

Q. When were the engines stopped, do you remember? A. 1:20.

Q. Was that when you got up to the "Hubbard"?

A. No, this was 1:20, when we sighted her.

Q. The engines were stopped when you sighted her? A. Yes.

Q. Then you proceeded to the "Hubbard"?

A. Yes.

Q. Did you go on deck while they were maneuvering to get the line on board? A. Yes.

Q. Then you took her in tow and started off for Astoria? A. Yes.

(Deposition of Peter Rodland.)

Q. Do you remember when the vessel arrived at the Columbia River bar?

A. Yes; it was about half-past 5, I think, that we arrived there—or a little before 5.

Q. What was the condition of the bar?

A. There was a strong freshet running.

Q. Did you have any difficulty in getting in?

A. Yes, it took us quite a time getting over the bar.

Q. Why?

A. Because the current was too strong.

Q. What power engines has the "Avalon"?

A. 625.

Q. 625 horse-power? A. Yes.

Q. Do you remember when the "Avalon" came up to the "Hubbard" after you saw her distress signals, how the "Hubbard" was lying in the sea?

A. Yes, she was lying in the trough.

Q. How high was her deckload, do you remember?

A. She had about a 15-foot deckload, I guess; something like [34] that—16 feet.

Q. What danger, if any, was there connected with the "Hubbard's" position then?

Mr. CAMPBELL.—We object to this; this man is not a navigator, but an engineer, and not qualified.

A. Well, if she had stayed there she would eventually have drifted ashore; there was a northwest wind and sea setting her in shore; if it should blow she might roll, lying in the trough like that and lose her deckload over.

(Deposition of Peter Rodland.)

Q. To lose her deckload her stanchions would have to have broken? A. Yes.

Q. Did you pass any other vessels on the way up to Astoria after you got your line on the "Hubbard"?

A. Not that I saw except there was one steamer inside of us, when we maneuvered to get a hawser on board—inside of us.

Q. Were you with the captain when he and the captain of the "Hubbard" signed the document with reference to the service?

A. No. I met them shortly afterwards ashore; I went up town to get a paper and met them shortly afterwards.

Q. How many members of the crew are there on the "Avalon"?

A. There were 23, all told—22 or 23.

Q. And there were that many at the time this service was performed? A. Yes.

Q. How did the "Avalon" and the "Hubbard" compare in size?

A. The "Hubbard" is much larger.

Q. The "Hubbard" is much larger? A. Yes.

Cross-examination.

Mr. CAMPBELL.—I would like to offer these entries in the log-book: 12:40, found Steamer "General Hubbard" in distress at 1:20 A. M.; worked engines to bells in maneuvering around her. Got hawser on board and commenced towing at 2:50 A. M.; full speed [35] 5 minutes past 3; crossed in over bar at 5:30 P. M.; towed the "General Hub-

(Deposition of Peter Rodland.)

bard" to anchorage; stand by to 7 minutes past 8; half speed 8 minutes past 8 and stop 8:14; then she anchored. A. Yes.

Q. Then you lifted up and went up to Astoria?

A. We took the captain off and went up to Astoria.

Q. Those are the entries from the engineer's log-book under date of July 25, 1916? A. Yes.

Redirect Examination.

Mr. LILLICK.—Q. I notice in your log-book, "Found steamer 'General Hubbard' in distress at 1:20 A. M.," and in the mate's log that she was sighted at 12:30 A. M. Which is the correct time?

A. I am down below, and I don't know anything about that; I only refer to the bells we get, when we get a bell from the bridge.

Q. So that the item, "Found 'General Hubbard' in distress at 1:20 A. M.," states the time at which your engines were worked and maneuvered to get the hawser on board? A. Yes. **[36]**

United States of America,
State and Northern District of California,
City and County of San Francisco,—ss.

I certify that, in pursuance of stipulation of counsel hereunto annexed, on Monday, October 16, 1916, before me, Francis Krull, a United States Commissioner for the Northern District of California, at San Francisco, at the office of Ira S. Lillick, Esq., in the Kohl Building, in the city and county of San Francisco, State of California, personally appeared Jens L. Christensen and Peter Rodland, witnesses

called on behalf of the libelant in the cause entitled in the caption hereof, and Ira S. Lillick, Esq., appeared as proctor for the libelant and Ira A. Campbell, Esq., appeared as proctor for the respondent; and that the said witnesses being by me first duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth in said cause, deposed and said as appears by their depositions hereunto annexed.

I further certify that the said depositions were then and there taken down in shorthand notes by Edward W. Lehner and thereafter reduced to typewriting; and I further certify that by stipulation of the proctors for the respective parties, the reading over of the depositions to the witnesses and the signing thereof was expressly waived.

And I do further certify that I have retained the said depositions in my possession for the purpose of delivering the same with my own hands to the Clerk of the United States District Court for the Northern District of California, the court for whom the same were taken.

And I do further certify that I am not of counsel nor attorney for either of the parties in the said depositions and [37] caption named, nor in any way interested in the event of the trial named in said caption.

IN WITNESS WHEREOF I have hereunto set my hand at my office aforesaid, this 26th day of March, 1917.

[Seal] FRANCIS KRULL,
United States Commissioner, Northern District of California, at San Francisco.

[Endorsed]: Filed Mar. 26, 1917. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. **[38]**

In the District Court of the United States, in and for the Northern District of California, First Division.

No. 16,075.

STEAMER AVALON COMPANY, a Corporation, Libelant,

vs.

American Steamer "GENERAL HUBBARD," Her Engines, Boilers, Machinery, Tackle, etc.,

Respondent.

(Deposition of Gustaf W. Johnson.)

BE IT REMEMBERED, That on Friday, November 24, 1916, pursuant to stipulation of counsel hereunto annexed, at the office of McCutchen, Olney & Willard, in the Merchants Exchange Building, in the city and county of San Francisco, personally appeared before me, Thomas B. Hayden, a United States Commissioner for the Northern District of California, authorized to take acknowledgments of bail and affidavits, etc., Gustaf W. Johnson, a witness called on behalf of the respondent.

Ira S. Lillick, Esq., appeared as proctor for libelant and Ira A. Campbell, Esq., appeared as proctor for respondent, and the said witness having been by me first duly cautioned and sworn to testify

the truth, the whole truth, and nothing but the truth in the cause aforesaid, did thereupon depose and say as is hereinafter set forth.

(It is hereby stipulated and agreed by and between the proctors for the respective parties that the deposition of the above-named witness may be taken *de bene esse* on behalf of the respondent, at [39] the offices of McCutchen, Olney & Willard, in the Merchants Exchange Building, in the city and county of San Francisco, State of California, on Friday, November 24, 1916, before Thomas B. Hayden, a United States Commissioner for the Northern District of California, and in shorthand by Wm. H. Barnum.

It is further stipulated that the deposition, when written up, may be read in evidence by either party on the trial of the cause; that all questions as to the notice of the time and place of taking the same are waived, and that all objections as to the form of the questions are waived unless objected to at the time of taking said deposition, and that all objections as to materiality and competency of the testimony are reserved to all parties.

(It is further stipulated that the reading over of the testimony to the witness and the signing thereof is hereby expressly waived.) [40]

GUSTAF W. JOHNSON, called for respondent, sworn.

Mr. CAMPBELL.—Q. State your full name.

A. Gustaf Waldamer Johnson.

(Deposition of Gustaf W. Johnson.)

Q. What is your business? A. Seafaring.

Q. What papers do you hold?

A. I hold a master's license for any ocean, at the present time.

Q. Were you chief officer of the steamer "General Hubbard" on July 25, 1916, at the time she was towed in the Columbia River by the "Avalon"?

A. Yes, sir.

Q. Were you on watch at the time the "Hubbard" broke down? A. No, sir.

Q. What was the first that you knew that she had become disabled?

A. I happened to wake up, when she shut down about 20 minutes to 12, I should judge; no, about 11 o'clock the first time, the first bell; a quarter to twelve she slowed down for good. We found out she was broke down. I was called out to get the line ready, and I got the towing line ready.

Q. When you came on deck were the lights of the steamer "Avalon" in sight?

A. Yes; we could barely see her headlight, because it was a dark night. You can see quite a ways off, one of those headlights is supposed to show about five miles; sometimes you can see them 6 or 7 miles, on a clear night.

Q. Was it cloudy or starlight?

A. The stars was all up. It was fine and clear. You could see Cape Meares, as plain as you can see.

Q. At the time that you saw the "Avalon's" lights was she heading towards you?

A. Yes, she was headed up north; she was on the

(Deposition of Gustaf W. Johnson.)

coast going north; she was pointed for Willapa Harbor. She found we was [41] in distress, and she altered her course a point or so, and hollered to us to know what was the matter.

Q. Where were you when she reached the vicinity of the "Hubbard"—where were you personally on board the boat?

A. When she sent up distress signals?

Q. No, when the "Avalon" came up?

A. I was right in the forecastle-head, and had everything ready; all of the crew were called out.

Q. Who was it that had charge of the sending up of the distress signals?

A. The captain was on the bridge; the second officer, Mr. Crone, carried out his orders.

Q. Did you have anything to do with sending up distress signals yourself?

A. No, sir; I had my hands full with the rope.

Q. What did you do on the forecastle-head?

A. I was standing up and had my heaving rope; I had a big hawser and running lines ready to give to the "Avalon." We didn't know whether she had any towing rope or not, so we got our own ready in the meantime. When she came up she said she had a rope, so we said, "All right, use yours if you think it is better; otherwise we can use ours."

Q. Was the hawser passed by means of the heaving line?

A. Yes, sir, the chief officer or second officer,—I don't know one from the other—he threw us a heaving line; the first one missed. We threw them one,

(Deposition of Gustaf W. Johnson.)

and that one missed; they threw us one, that missed; we threw the fourth one to them and they got it.

Q. Where was the "Avalon" at that time, ahead of you or to one side of you?

A. She was just about ahead of us, just a little on the port bow.

Q. When the heaving line was passed, how did you haul your hawser aboard? [42]

A. We tied on the 3-inch manila line, and we hauled that line aboard the "Hubbard," and started to use the windlass until we got his hawser; it only took about 10 or 15 minutes, and the whole thing was fast after we got it aboard.

Q. What was the condition of the surface of the water all of this time?

A. It was a smooth sea and light swell.

Q. What effect, if any, did the swell have on the "General Hubbard"?

A. It did not have any effect; she was as steady as she could be.

Q. Was the swell sufficient to cause the "Hubbard" to roll?

A. No, sir; she never moved; she was loaded and a loaded vessel never moves in weather like that.

Q. How did she lay with respect to the swells?

A. About aside to the swells.

Q. After the hawser was made fast, what was done?

A. We gave them the signal that the rope was all fast, then, of course, she proceeded to hold while the "Avalon" made fast; when she had her rope made

(Deposition of Gustaf W. Johnson.)

fast, and was certain she had enough rope then she went full speed and proceeded to Astoria.

Q. What time did you arrive, approximately, at the entrance to the Columbia River?

A. I don't exactly remember; I think it was somewheres about a quarter after four, in the afternoon.

Q. In the afternoon?

A. Yes, sir; in the afternoon.

Q. What kind of weather had you had all the rest of the night, and during the day of the 26th?

A. We had fine weather all the way; clear sky and light wind, northwest; a little swell, nothing to speak of; little rollers once in a while.

Q. Little rollers coming down?

A. Nothing to speak of. Not enough to stop us, or enough to make any disturbance, or roll the [43] ship or anything of that kind.

Q. When you got into the Columbia River how was the tide in the river running?

A. The tide was ebbing a little.

Q. How was the current of the river?

A. The current was against us; when the tide ebbs, the current runs out.

Q. What headway did the "Avalon" make with the "Hubbard" against the tide and the current?

A. About 3 miles an hour, I should judge.

Q. It has been testified by the captain of the "Avalon" that the current in the river when you were opposite the end of the jetty set the "Hubbard" over to one side, to the southward, toward the jetty, and that he all the time was heading up to

(Deposition of Gustaf W. Johnson.)

the northward; I will ask you whether or not that is true?

A. No, sir; we followed him right along; and the way he done it,—he was not very much acquainted around with the river, so he followed the black buoys.

Q. On which side of the river?

A. On the left.

Q. On the north side? A. Yes, sir.

Q. What is the general direction of the river down there?

A. I forget the coast now. It is a straight coast until you get up to buoy No. 14.

Q. Generally, is it east and west, or north and south?

A. No, it is east and west. I will tell you a little closer, northeast by east, take it right through up there.

Q. Were you at any time headed across the river so that the "Avalon" was headed to the northward and you were tailing to the southeast?

A. No, sir; we followed her tow line; that is all we could do in fact; we could only steer after her.

Q. At any time while you were entering the river or in the river were the swells ever setting you over towards the south jetty? A. No, sir. [44]

Q. Was there ever at any time, before or after entering the river, or while in the river, any time that your steamer was in any danger whatsoever of drifting over out the south jetty? A. No, sir.

Q. What was the condition of the surface of the water on the Columbia River bar?

(Deposition of Gustaf W. Johnson.)

A. It was smooth, smooth as it could be; no swell on it at all; nothing at all.

Q. If there had been any danger in entering the river at the time that you did, what would you say as proper place for anchoring outside until the tide was right?

A. It was fine there. You could drop anchor any place by the pilot buoy or the whistling buoy.

Q. What can you say as to vessels customarily anchoring there?

A. Between the whistling buoy and the pilot buoy is a good place to anchor, when you could not go in on account of thick fog.

Q. Were there any pilot buoys outside when you were up there?

A. I don't remember; I think there was one, if I am not mistaken. I think there was a pilot buoy laying there at the time.

Q. At any time while the "Hubbard" was in tow of the "Avalon," either on the open sea or in the river did she sheer or veer from side to side?

A. No, sir; she might take a slight sheer once in a while. No vessel towed by a tug,—it makes no difference—I don't care whether it is smooth or rough, she is bound to make a little sheer, about a half a point to either side.

Q. Aside from that kind of sheering was there any amount of sheering on the part of the "General Hubbard" at any time? A. No, not a thing.

Q. It is alleged in the libel filed here that the two vessels labored heavily on account of the strong

(Deposition of Gustaf W. Johnson.)

current out of the Columbia bar: is that true, or not true.

A. No; it is absolutely not true. [45] I didn't see any laboring there. There could not be any laboring, there was no rough sea there. A man with any common sense would not contemplate to tow a vessel in over the bar if it was rough. The only thing we had there was a little ebb tide against us, so we could not make the headway the same as we could any other time. It was smooth; a fine, lovely, nice evening; cloudy sky, that is all, as far as I know.

Cross-examination.

Mr. LILLICK.—Q. How long have you been going to sea? A. Well, about twenty-two years.

Q. On this coast or on the other coast?

A. No, I should judge I have been 16 or 17 years on this coast.

Q. On lumber schooners most of the time.

A. Once in a while I ran to Australia, all over the world, and to Europe.

Q. You have been running on this coast during this 16 years?

A. I have been running to Australia and over to the Orient.

Q. How many trips have you made up and down the coast? A. I don't know, sir.

Q. Approximately, how many?

A. I cannot tell you.

Q. Twenty? A. About twenty times over.

Q. Twenty times twenty: 400, you say?

(Deposition of Gustaf W. Johnson.)

A. I could not tell you.

Q. How long have you been on the "Hubbard"?

A. About two and a half years.

Q. She was running between what ports while you were on her?

A. Columbia River and San Pedro, Gray's Harbor and San Pedro, for 7, 8 or 9 months, when I was on her.

Q. The "Hubbard" has been sold, hasn't she?

A. Yes, she has a Norwegian flag over her stern; she was sold about two months ago.

Q. Are you still working for the Hammond Lumber Company?

A. I don't know; I am paid off. [46]

Q. How long ago were you paid off?

A. About eight weeks ago.

Q. Were you standing by here?

A. No; I have been up for a master's license in the meantime. I don't care if the Hammond Lumber Company gives me another job or not; if it does all well and good.

Q. There had been a storm a few days before this, up there?

A. Probably had a little blow, I don't know.

Q. That evening as you were coming down I think you said a little while ago the sky was cloudy?

A. Yes, sir, a cloudy sky.

Q. That was the night of the storm that they had?

Mr. CAMPBELL.—The day he refers to.

Q. You say the evening?

A. Some evenings you have cloudy skies; you may

(Deposition of Gustaf W. Johnson.)

if you are going to have a gale of wind, and it may be clear for a while.

Mr. LILLICK.—Q. Then a gale would come up in a couple of hours?

A. No, it all depends.

Q. Isn't that Washington and Oregon coast a stormy coast? A. Not in the summer.

Q. Doesn't a gale come up in two or three hours?

A. Not in the summer-time; in the winter-time you can expect it.

Q. Don't they have storms in May and June?

A. They have strong north winds.

Q. Stronger winds in May than in the winter months? A. Sometime they have.

Q. Then those winds come up very quickly?

A. No; you take a westerly wind, it may blow for about two or three days; when it comes quickly it figures back to north or northwest.

Q. When these gales come up they come up within two or three hours?

A. It takes longer than that.

Q. Have you not been off the Oregon and Washington coast when a [47] gale comes up with a couple of hours?

A. I have been off the coast when we had a strong wind from the southwest.

Q. Have you not been off the Oregon and Washington coast when a gale came from the southeast; that is, winters sometimes, and sometimes in May and June?

A. Southeasterly winds,—in the months of May

(Deposition of Gustaf W. Johnson.)

and June, it is fine weather.

Q. You have been on this coast in May and June?

A. More or less, up and down, lots of times.

Q. Is it not a fact that in May and June they sometimes have storms of greater violence than they have even in the winter?

A. I didn't see it that way.

Q. That is not your experience?

A. The only time I am afraid of any heavy weather is in the winter.

Q. I am not speaking of the weather in the winter; I am speaking of the weather off the Washington and Oregon coast in the summer; they have very heavy wind storms, do they not in the summer? A. Sometimes.

Q. You say sometimes?

A. No, in the summer months you have north wind; that is just what you have, north wind, moderate north wind; it may blow a strong wind; you don't exactly have any gale. In the fall of the year you will have westerly winds and southwest. In the winter you may have a strong southwestern, once in a while and heavy gale; that is just the kind of weather you have.

Q. Have you not in your experience in the summer months sometimes had very heavy gales?

A. No, I never have.

Q. You have never had a heavy gale in the summer months off the Oregon and Washington coast?

A. No, sir; strong, fresh, northwest wind.

Q. How many knots an hour do you call a strong, fresh northwest wind? [48]

(Deposition of Gustaf W. Johnson.)

A. If you take it by the Beaufort scale, number 7.

Q. Number 7 is how many knots an hour?

A. You can figure that out; it would be easy to figure it out.

Q. Which is No. 7 of the Beaufort scale?

A. The wind runs from one up to twelve. I would not call it a gale.

Q. What is one knot an hour?

A. Light air.

Q. What is No. 2?

A. No. 2 is light; No. 3 is light; 4 and 5 is moderate; 6 and 7 is strong or fresh; six is fresh, seven is strong; eight and nine up to ten and eleven is a gale; and twelve is a hurricane.

Q. Let's go back to that No. 7; how many knots an hour is No. 7 on the Beaufort scale?

A. I should judge about, maybe about, say, about 20 miles an hour.

Q. You say that you have never known wind of more than No. 7 violence in the summer off the Oregon and Washington coast?

A. No, I never knew of any. I might be down south when they had a wind storm up there and read about it in the newspapers. I never had any experience up there in the summer.

Q. Then you have never known in your experience off the Washington and Oregon coast of a wind storm of greater violence than twenty miles an hour when you have been going up this coast during the sixteen years you have?

A. No, sir; I have never been caught in anything stronger than that.

(Deposition of Gustaf W. Johnson.)

Q. You have never been in wind of a greater violence than twenty miles an hour off the Washington and Oregon coast? A. No, not in that direction.

Q. From what other direction would they come?

A. We are talking about the summer months; there is only one kind of wind in the summer. [49]

Q. That is what kind of wind? A. Northern.

Q. Let us take that kind of a wind: You have never during the sixteen years you have been to sea on this coast been in a wind of greater violence than 20 knots an hour off the Washington and Oregon coast? A. No, sir.

Q. How long were you on the "Hubbard"—about two years and a half, you say?

A. Yes, sir, about. I cannot tell you to the minute or hour. I can tell you about. It may be only two years and three months. I was on the "George W. Fenwick" previous to that.

Q. This is your writing in the log-book which Mr. Campbell has just handed to me (showing witness book)?

A. Yes, that is the "Hubbard's" log-book. Yes, that is my writing (after examining book).

Q. How often did you write this up?

A. Every day, as we go along; whenever I had time, when I got through in the evening, afternoon, or any time.

Q. I call your attention to Saturday, July 15, 1916, and ask you when you wrote up that page?

Mr. CAMPBELL.—What day is this?

Mr. LILLICK.—July 15, 1916.

(Deposition of Gustaf W. Johnson.)

Mr. CAMPBELL.—That is 10 days before the accident. I object to the materiality of that.

Mr. LILLICK.—Q. Do you know whether you wrote that up on July 15, 1916?

A. I could not swear to it.

Q. Do you know if you wrote it a week afterwards—what is your best recollection as to when you wrote that up? A. We keep a scrap log-book.

Q. When did you write the entry on that day?

Mr. CAMPBELL.—We object to the question as being absurd [50] upon its face; as four months afterwards he cannot tell when he wrote a particular entry.

The WITNESS.—When I have time—

Mr. LILLICK.—Q. What is your best recollection as to when you wrote up the entries of the log-book for July 15, 1916?

A. I wrote it on Saturday, I should judge.

Q. On Saturday, July 15th? A. Yes, sir.

Q. And the entries on Sunday, July 16th?

A. I wrote them on Sunday; the one on Monday, I followed suit.

Q. And on Monday you wrote up the entries appearing on Monday, July 18th? A. Yes, sir.

Q. And the following Tuesday, when did you write up that?

A. The same day; whenever I have a chance in the evening or afternoon I would start to write this up.

Q. So that you wrote this up from day to day?

A. Yes, sir.

Q. Why did you get a new log-book?

(Deposition of Gustaf W. Johnson.)

A. Because this log-book was called for.

Q. Do you remember when this log-book was called for? A. No, I don't know.

Q. I notice that you stopped writing up this log-book on the second day of August? A. Yes, sir.

Q. Do you know whether or not the log-book was called for on the second day of August?

A. I don't know, sir.

Q. You only know that you wrote up no more entries in this log-book?

A. The captain told me he wanted that log-book; I gave it to him.

Q. At the same time you wrote all of these entries after the captain asked you to let him have the log-book?

A. No, I didn't. I don't know what you mean, in fact. **[51]**

Q. I mean this: Mr. Johnson, after the captain had told you he wanted the log-book you wrote these entries all up?

A. I understand, there is something there you want to get, and I want to give it to you. You want to know if I wrote my log-book every day? I did it every day, when convenient.

Q. Then when you told me a little while ago that you wrote up the entries in the log-book on the first pages, Saturday, July 15, 1916, you want me to understand that you now wish to answer that you may not have written it on that day?

A. No; I simply put down in the evening—Wednesday, so and so, August 2d, crew resumed

(Deposition of Gustaf W. Johnson.)

chipping and painting—I knew we had to do that. Furthermore, I don't know why that is the way I put it down. The captain asked me for the log-book.

Q. You said a minute or two ago that you wrote up this log-book when you had time to do it. Do you want to change your testimony that you gave that you wrote up these entries that appear on the first page on Saturday?

A. No, sir, I don't want to change it. I wrote it up as I go along.

Mr. LILLICK.—We call upon the claimant to give us the log-book in which the entries for Friday, July 14, 1916, appear.

Mr. CAMPBELL.—That has already been presented to you.

Mr. LILLICK.—I mean the log-book which is the log made up from the scratch log, which has the entries for Friday, July 14th.

Mr. CAMPBELL.—I tender you the book of original entry.

Mr. LILLICK.—I desire to see the book and find out whether or not this log-book that has been presented is a log-book that Mr. Johnson made up from another log-book, and started on July 15th, but copied from another log-book; that is the purpose of it.

Mr. CAMPBELL.—Compare them with the bridge log.

Mr. LILLICK.—Let the record show that the libelant has made **[52]** a demand upon the claim-

(Deposition of Gustaf W. Johnson.)

ant for the log-book of the steamer "General Hubbard" on Voyage No. 92, from San Francisco towards the Columbia River, containing the entries for Friday, July 14, 1916, for the reason that the libelant desires to compare that log-book with the log-book that has been presented to see whether the log-book that has been presented is a copy of another log-book covering not only Friday, July 14th, but the subsequent days, and from July 16th up to and including Wednesday, August 2, 1916.

Mr. CAMPBELL.—I don't know whether that can be done or not. The steamer has gone foreign, and it may be that the log-books are on board. We again tender you the original log of entry, with the bridge log, which you can compare.

Mr. LILLICK.—I do not want to insinuate—but I do insinuate that another log-book for the steamer "General Hubbard" towards Columbia River from San Francisco, containing these entries is in existence; and it seems to me peculiar that these particular entries should be in another log-book, and then the entries stop on the day of this tow.

Mr. CAMPBELL.—The entries do not stop on the day of the tow. I would like to know what is the basis of that insinuation.

Mr. LILLICK.—The basis of the insinuation is that the entries here on July 15, 16, and 18th—I may be wrong—bear upon the face of this log-book the evidences of having been copied from something else, and that this log-book is not the log-book of

(Deposition of Gustaf W. Johnson.)

this vessel that was made up by the officers at that time.

Mr. CAMPBELL.—What is there on the face that leads you to make this insinuation that you say you are doing?

Mr. LILLICK.—The first few pages of this log-book are not mussed up in any way. In the "Remarks" appears the date, Monday, July 18th, and on the following page, Tuesday, July 18th, 1916. **[53]**

Mr. CAMPBELL.—Just read on. What is the date given for Wednesday?

Mr. LILLICK.—July 19, 1916—shall I go on—and Friday, July 21, 1916.

Mr. CAMPBELL.—It is all Greek to me. What are you driving at? Are you insinuating that I have done something—what is it?

Mr. LILLICK.—I am very sure you haven't, Mr. Campbell; I am sure about that. It is an insinuation against the employers who furnished this log-book to you.

Mr. CAMPBELL.—The employees did not furnish it to me; the company furnished it.

Mr. LILLICK.—Q. Where were your quarters, the sleeping quarters, on the "Hubbard," Mr. Johnson? A. On the after deck, on the starboard side.

Q. Do you remember what time it was when you got up on deck?

A. Somewheres about twelve o'clock.

Q. You did not look at your watch?

A. No, I was called out at one bell, at 10 minutes

(Deposition of Gustaf W. Johnson.)

to twelve; I got on deck just five minutes afterwards.

Q. Do you mean one bell?

A. One bell signifies that the watch is going to be called out.

Q. How long did it take you to get up on deck?

A. About five minutes, I should judge.

Q. The lights of the "Avalon" were in sight when you got on deck?

A. Yes, I could just about see there was something going; she was steaming up.

Q. Did you see any other lights except the lights of the lighthouse?

A. Yes, two or three more steamers. **[54]**

Q. Going what direction?

A. Two bound south.

Q. You saw them at the same time you saw the "Avalon's" lights?

A. No, I seen the "Avalon" first.

Q. When did you see these others? I asked you when you came on deck whether you saw other lights, and you said you saw the lights of two other vessels? A. That was afterwards.

Q. How long afterwards?

A. Maybe ten minutes afterwards.

Q. Where was the "Avalon" then?

A. Still steaming to sea.

Q. Did the other vessels go on their way?

A. One came up to us; when she seen the "Avalon" there she did not venture to hail us.

Q. Do you know what vessel it was?

(Deposition of Gustaf W. Johnson.)

A. No, I could not tell you, sir.

Q. What distress signals did you have out?

A. Skyrockets.

Q. What else? A. Searchlight.

Q. Do you know how many skyrockets were sent up? A. I don't know, sir.

Q. Were any sent out after you came on deck?

A. Probably one or two; I was busy working.

Q. Did you see one or two?

A. I heard some noise; I heard something; I didn't see it; most of them were sent up before I came on deck.

Q. Did you hear the noise of the first ones being set off?

A. I was asleep when the first ones were sent up; I didn't hear much about them, I don't think.

Q. After you had awakened at one bell, and before you got on deck, did you hear any other sent up?

A. I am not positive; but I believe they sent one up.

Q. One up? A. Yes, sir.

Q. Do you remember whether or not that while you were loading at Astoria, the Columbia River was in freshet?

A. When we were loading? [55]

Q. Yes? A. What do you mean by that?

Q. That the Columbia River was high, and that there was an unusual amount of water in the river?

A. No, I didn't pay much attention to that at all, because we were loading in different places, you can't tell. I didn't see any difference from any

(Deposition of Gustaf W. Johnson.)

other times when I was there. I don't know anything about that.

Mr. CAMPBELL.—Would a freshet increase the height of the water in the river?

Mr. LILLICK.—I am not prepared to say.

Mr. CAMPBELL.—I was wondering if a freshet of water would be controlled by the freshet in the river or by the Pacific Ocean.

Mr. LILLICK.—You probably know more about that than I do.

Q. It had been raining, had it not, at Astoria while you were there loading?

A. I don't remember. I cannot tell you. The log-book will probably tell you. I cannot keep all those things in my mind.

Q. Do you remember, independent of the log-book, that when the vessel was passing out on July 25, 1916 it was raining?

A. I don't remember; probably there had been a little drizzling rain. It is more than I know just now; otherwise the weather was fine when we passed out.

Q. There was a following sea when you passed out, was there not?

A. There was a little sea on probably, it all depends.

Q. What is your best recollection of the sea?

A. It was a moderate sea.

Q. That sea continued, did it not, while you were going on out and down? A. No, sir.

Q. When did it stop, if it did stop?

(Deposition of Gustaf W. Johnson.)

A. The sea simply smoothed down. There was no sea on at all during the evening, about 8 **[56]** o'clock when I went on the bridge. There was little sea on at 5 or 6 o'clock, but it was moderate. During the night the sea was absolutely gone; little swell on.

Q. I call your attention to the entry at 8 o'clock on Tuesday, July 25, 1916: "Following small sea; same very moderate"; do you remember that?

A. A small sea, that means just a little bit.

Q. It would not be in the log-book if there was not a sea of such a character to warrant your putting it in the log-book?

A. A small sea means that it is almost smooth; little light winds. A sea sometimes might be as big as a ship, and sometimes it might not be any higher than this table.

Q. This table is about 2½ feet high, isn't it?

A. Yes, sir.

Q. What character of a sea is it that calls upon you to enter it upon the log-book?

A. A small sea, that is almost smooth.

Q. You make the entries in the log-book of a sea that is, as you call it, almost smooth?

A. A light winded small sea; there could not be no heavy sea in light wind; it can be a swell; a little swell on probably—that stands to reason.

Q. I notice in your log-book for Friday, July 28, 1916, at 12 o'clock, P. M. "Fresh northwest wind, clear and following sea"; now, speaking from what you enter in your log-book, there was a difference

(Deposition of Gustaf W. Johnson.)

between the following sea that you have marked there as "a following sea" and the one that you entered upon the log-book for July 25, 1916, at 8 o'clock A. M. "following small sea"?

Mr. CAMPBELL.—I will ask counsel to show the witness the log-book.

Mr. LILLICK.—I have done so.

Mr. CAMPBELL.—Q. Do you understand the question?

The WITNESS.—No, I don't know what you mean.

Mr. LILLICK.—Repeat the question. [57]

(Question repeated by reporter as follows: "I notice in your log-book for Friday, July 18, 1916, at 12 o'clock P. M. 'Fresh northwest wind, clear and following sea'; now, speaking from what you enter in your log-book, there was a difference between the following sea that you have marked there as a 'following sea' and the one that you entered upon the log-book for July 25, 1916, at 8 o'clock A. M., 'following small sea'?")

A. What wind have you got? If you have got a strong wind—

Q. (Intg.) You have in the log-book that you made these entries in, on the 28th of July in that log-book, "following sea," and on July 25th, at 8 o'clock in the morning, you have the entry, "following small sea"; I want you to tell me what the difference was between those two seas; one you marked "following sea" and the other "following small sea"?

(Deposition of Gustaf W. Johnson.)

A. The difference was because the wind was light; here the wind is fresh, so that when the wind is fresh, the sea is little.

Q. "Following sea" is an entry to designate a sea of greater intensity?

A. Yes; the sea generally comes up according to the wind; but it does not state it is a heavy sea.

Q. Was there a swell on, on the 28th of July, 1916?

A. I don't remember, sir.

Mr. CAMPBELL.—You can use the log-book to refresh your recollection.

Mr. LILLICK.—Q. On Sunday, July 30, 1916, you have the entry: "Com"—that means "came"—"Com. in strong northwest wind, clear and choppy sea." Do you remember that?

A. Sure; if I remember; you don't expect me to remember every day in the year; Jesus Christ could not do that.

Q. At four o'clock in the morning— [58]

Mr. CAMPBELL.—I object to counsel nagging the witness.

Mr. LILLICK.—I am not attempting to nag the witness. I am sure that you don't mean that I am purposely trying to nag the witness.

Mr. CAMPBELL.—I don't know what can be the purpose of the examination that you are making unless it is an endeavor to confuse the mind of the witness.

Mr. LILLICK.—You certainly do not contend that my manner is a nagging manner.

Mr. CAMPBELL.—Your attitude toward the wit-

(Deposition of Gustaf W. Johnson.)

ness is such—it is not such—that your are making a serious examination that would be material to the Court.

Mr. LILLICK.—I am surprised that counsel thinks I am improperly examining the witness. I am calling the witness' attention to separate items in the log-book.

Mr. CAMPBELL.—You are not asking the respective days on which any of this transpired, and you are asking this man to tell you the character of weather that prevailed over a number of days without exhibiting the log-book to him.

Mr. LILLICK.—I am asking him to look at the log-book with me, and I am examining him on the condition of the wind and weather on the day and evening she broke down.

Q. Calling your attention to the entries under Sunday, July 30, 1916—

Mr. CAMPBELL.—That is not the day she broke down; that is days afterwards, when she was on her voyage south.

Mr. LILLICK.—I am in error; this is the part of the log-book that is marked on the side with a lead pencil.

Mr. CAMPBELL.—Do those markings still appear there, Mr. Lillick? Can you see them? **[59]**

Mr. LILLICK.—Yes, they do.

Mr. CAMPBELL.—What are the markings?

Mr. LILLICK.—The markings run from the entry 4 A. M. on Monday, July 24th, down to and including the entry at 5:20 P. M. on July 31st.

(Deposition of Gustaf W. Johnson.)

Mr. CAMPBELL.—That is a lead pencil mark that runs down the margin; it is a line on the margin of the log-book. It is a line that runs down the margin?

Mr. LILLICK.—Yes, in the log-book.

Q. At 4 o'clock A. M. of the same day appears the entry, "same weather"; that is correct?

A. Yes, sir, that is correct.

Q. I call your attention to the entry under Tuesday, July 25, 1916, to the entry, 12:15 A. M. "Steamers' lights in shore. Made signals of distress which was answered and proved to be steamship 'Avalon,' agreeing with Captain to tow us to Astoria and towage to be settled by owners amicably or by arbitration, if necessary." Did the captain tell you to enter that in the log-book?

A. No, he did not tell me exactly; but I write it down the way things happen.

Q. Were you there when he talked to the captain of the "Avalon"?

A. Sure I was there; he talked to him in the megaphone.

Q. Have you any independent recollection of when you wrote that entry appearing opposite 8 o'clock A. M. on July 25, 1916, of "following small sea; same very moderate"; have you any independent recollection of the sea outside of that entry, about the sea itself?

A. That is the way it was, small sea, that is all I can put down.

Mr. CAMPBELL.—Q. What time was that?

(Deposition of Gustaf W. Johnson.)

A. It was breezing up a little off the heads.

Mr. LILLICK.—Q. Is there any difference usually in the weather, so far as the wind and sea is concerned, south of Meares [60] Lighthouse and north?

A. It all depends about the distance below or above Meares.

Q. Say 10 miles?

A. The further up you go, it all depends on the weather.

Q. The further up you go the weather is usually worse? A. No.

Q. Is there any difference at all?

A. I could not tell you. I'll tell you, you can have bad weather here and the finest kind of weather up in Seattle; I am not a weather man. It may be the finest weather going and we would have a gale of wind, and you would see in the paper it was fine.

Mr. LILLICK.—For the purpose of the question as to the manner in which this log-book was written up, but not to be bound by the entries in it, we wish the log-book to be offered in evidence as our exhibit No. 1.

(The log-book is marked Libelant's Exhibit No. 1.)

Mr. LILLICK.—May I see the other one?

Mr. CAMPBELL.—What is the one you want now?

Mr. LILLICK.—I want the scratch log of the "Hubbard."

Mr. CAMPBELL.—I will produce it.

(Deposition of Gustaf W. Johnson.)

Mr. LILLICK.—Q. In entering in your log-book a fresh northwest wind, what approximate velocity is there to the wind when you make an entry, "fresh," as you have it in your log-book?

A. It means it is a little better than moderate; it is breezing up; it is fresh.

Q. How many knots an hour?

A. It all depends.

Q. I am asking you as the man who made those entries in the log-book—we will put it this way: A fresh northwest wind means a wind from the northwest and from 10 to 20 knots an hour, or 20 to 30, or 30 to 40? A. No, I would call that strong.

Q. What would you call strong?

A. Anything from 15 to 20—it all depends. **[61]**

Q. Didn't you say a moment ago that you would call a wind from 15 to 20 knots an hour, strong?

A. Sure, it would be; it would be strong. Say you go by the Beaufort scale, one is light; three and four you may call moderate; and five fresh; you call six or seven, strong.

Q. Then when you entered in your log-book—and you made these entries—the items fresh northwest wind, you had in mind the Beaufort scale, did you?

A. Yes, sure thing.

Q. What on the Beaufort scale did you intend fresh northwest wind to indicate?

A. Number five.

Q. Where was that pilot boat that you saw at the entrance to the bar?

A. On the starboard side, I believe.

(Deposition of Gustaf W. Johnson.)

Q. How far away? A. About a half a mile.

Q. Why did you say you did not remember whether there was a pilot boat there?

A. If I remember, going in, you mean?

Q. Yes.

A. I don't remember exactly, but I think I realize there was one on the starboard side; I think there was one on the starboard side. I also think she was at anchor. She layed there at anchor. I would not swear about it, whether it was a pilot boat or not.

Q. You don't know whether there was or not?

A. I am not sure it was a pilot boat; that is her station, just about where she is supposed to be.

Q. You don't know whether there was one or not?

A. I am not positively sure it was a pilot boat, but I think there was a boat laying there. It may have been a fishing boat; she had a gasoline engine; the power in the boat was a motor, she had motor power.

Q. Why did you come to the conclusion that she had a gasoline motor in her? A. I know. [62]

Q. Do you know the captain of the "Avalon"?

A. I don't know him at all; I seen him, that is all.

Q. Do you know how long he has been going back and forth to Astoria?

A. He is an old-timer around here.

Q. He was an old-timer up there?

A. He must be up and down the coast; I don't know about Astoria; I didn't think he knew much about the bar going in there.

(Deposition of Gustaf W. Johnson.)

Q. You a moment ago said because he said so, did you not?

A. That is what he hollered to us. He said *he to* go to anchor at a certain place; we said, nothing doing, let's do down here; he said, "I am glad of it; I am not very much acquainted around here." I heard him say that to the captain.

Q. Where was the captain of the "Avalon"?

A. On the bridge.

Q. He was calling, was he?

A. He just hollered through the megaphone.

Q. How long was the tow-line?

A. He shortened her up after he got in the river.

Q. That was after he got in the river?

A. Sure.

Q. How long was the tow-line there?

A. The greater part of it was a couple of hundred fathoms; he used all of the rope he could on the outside; he shortened it up.

Q. How long was that?

A. The line, maybe 450 or 500 feet long; I cannot tell you; I am not sure.

Q. You were on board the "'Hubbard" going up?

A. Yes, sir.

Q. You saw the "Avalon" ahead of you?

A. I cannot judge the distance; he shortened his line.

Q. When the "Avalon" first started out with the "Hubbard" in tow, how long was the line between the two vessels?

(Deposition of Gustaf W. Johnson.)

A. I don't know for sure; I could not tell you. [63]

Q. Could you tell whether it was 1,000 fathoms long?

A. Yes, I know for a fact it was nothing over 600 feet long.

Q. It was not over 600 feet?

A. Six hundred feet; I don't think it was over 600 feet; I don't know how long this line was; I don't know anything about it.

Q. How long was it after you got in, after you shortened it up?

A. I don't know, but I do know he shortened it.

Q. You don't know how much—how far?

A. No.

Q. To the best of your recollection the stern of the "Avalon" was how far from the stem of the "Hubbard" after you had gone inside?

A. I would not swear to that.

Q. How far away was the end of the jetty from you as you went past it?

A. Quite a ways.

Q. How far is "quite a ways"?

A. About two miles probably—you mean when—

Q. (Intg.) Repeat the question. (Question repeated by the reporter as follows:) "Q. How far away was the end of the jetty from you as you went past it?"

A. When we entered the bar, the jetty runs right out towards the bar on the Columbia River. The jetty, I should judge, was about a mile or so.

(Deposition of Gustaf W. Johnson.)

Q. A mile or so away from you as you went past it?

A. Yes, as we went in—the channel is about one mile, say.

Q. That is not what I asked you: How far away was the end of that jetty from the "Hubbard" when you passed it going in?

A. I don't know; I didn't measure it; if you don't want to take my word for it I cannot give it to you any more correct.

Q. Was it a mile away, or half a mile away?

A. I told you it would probably be about a mile, maybe less than that. **[64]**

Q. On direct examination you said that a loaded vessel does not roll?

A. No, sir; with a deckload of lumber and in that kind of weather.

Mr. CAMPBELL.—He said that night.

Mr. LILLICK.—Q. My notes state that the witness testified that a loaded vessel does not roll, I want to ask you now whether a loaded vessel ever rolls?

A. It all depends on what kind of a cargo she has got, and what kind of weather and wind and sea.

Q. A vessel loaded as the "Hubbard" was, with a deck cargo of lumber, and heavy weather, will she roll?

A. A little bit in heavy weather. The deckload keeps her steady.

Q. Did the "Hubbard" have a cargo in her hold too? A. Sure thing.

Q. She had her deck cargo too, did she not?

(Deposition of Gustaf W. Johnson.)

A. Sure thing, certainly.

Q. Do you know of any occasions on the coast here where a steam schooner like the "General Hubbard," with a hold cargo and deck cargo of lumber has gotten in a heavy sea and lost her deck cargo because she was rolling in the heavy sea?

A. Yes, there is cases; it all depends on what kind of ships, and how they are built.

Q. When you attempted to pass those heaving lines what caused the three misses, if you know?

A. Just caused by accident; making a grab for the line—you cannot grab a line every time.

Q. How near did the "Avalon" get to the "Hubbard" when they were passing those lines?

A. About, I should judge, about 15 fathoms; between 15 and 18 fathoms; the heaving line I had was about 20 fathoms long. I had that line pretty well stretched along; I should say he was 15 or 18 fathoms.

Q. You said the "Hubbard" was laying in the trough of the sea; the sea, such as there was, was coming from the south towards her?

A. Yes, sir. **[65]**

Q. Was she helpless?

A. Of course, when a vessel is broke down in that way, she cannot do nothing.

Q. Did she have any sail on board?

A. We had some tarpaulins.

Q. Did you have any masts? A. Yes, sir.

Q. How high were the masts?

A. I don't remember exactly; quite high.

(Deposition of Gustaf W. Johnson.)

Q. Quite high, what do you mean by "quite high"? A. Say about 90.

Q. About 90 feet? A. Yes, sir.

Q. How far were you from shore?

A. About 14 miles off Cape Meares, somewheres about that—I am not positively sure. I know the log-book tells you the distance off, I guess; I don't remember now.

Redirect Examination.

Mr. CAMPBELL.—Q. I want to know whether or not this log-book which has been offered in evidence, and in respect to which Mr. Lillick has been questioning you, was copied from any other log-book of the same kind? A. No, sir.

Q. Have you ever written up two log-books of the "General Hubbard" covering these days from July 15th to August 2, 1916?

A. No, sir; that is the only one.

Q. Were these entries made all at one time, or were they made out day by day?

A. They were made day by day, according to my time; sometimes I wrote in the evening; sometimes in the afternoon; it all depends.

Q. Which side of the channel at the entrance to the Columbia River did the "Avalon" take in going up the river? A. To the left-hand side.

Q. Was that side nearest or the side furthest from the jetty?

A. The side furthest from the jetty. [66]

Q. Do you know how wide the channel is at the end of the jetty?

(Deposition of Gustaf W. Johnson.)

A. I should judge a mile; a mile right across, in between the buoys.

Q. Do you know how far the jetty is to the southward of the red buoys marking the southerly side of the channel?

A. About a quarter of a mile; it might be half a mile probably; say half a mile; I am not positively sure.

Q. What have you done in San Franicsco for the last eight weeks?

A. I have been up for a master's license; I just got through a few days ago.

Mr. LILLICK.—Q. Did you get your license, Captain? A. Yes, sir.

Mr. CAMPBELL.—That is all.

Mr. LILLICK.—That is all. [67]

United States of America,
State and Northern District of California,
City and County of San Francisco,—ss.

I certify that, in pursuance of stipulation of counsel, on Friday, November 24, 1916, before me, Thomas D. Hayden, a United States Commissioner for the Northern District of California, at San Francisco, at the offices of Messrs. McCutchen, Olney & Willard, in the Merchants Exchange Building, in the city and county of San Francisco, State of California, personally appeared Gustaf W. Johnson, a witness called on behalf of respondent in the cause entitled in the caption hereof, and Ira S. Lillick, Esq., appeared as proctor for libelant, and Ira A. Campbell, Esq., appeared as proctor for re-

spondent; and the said witness being by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in said cause, deposed and said as appears by his deposition hereto annexed.

I further certify that the deposition was then and there taken down in shorthand notes by W. H. Barnum, and thereafter reduced to typewriting; and I further certify that by stipulation of the proctors for the respective parties, the reading over of the deposition to the witness and the signing thereof was expressly waived.

Accompanying said deposition and referred to and specified therein in Libelant's Exhibit No. 1.

And I do further certify that I have retained the said deposition in my possession for the purpose of delivering the same with my own hands to the Clerk of the United States District Court for the Northern District of California, the court for which the same was taken.

And I do further certify that I am not of counsel, nor attorney [68] for either of the parties in said deposition and caption named, nor in any way interested in the event of the cause named in the said caption.

IN WITNESS WHEREOF, I have hereunto set my hand in my office aforesaid this 26 day of March, 1917.

[Seal] THOMAS E. HAYDEN,

United States Commissioner, Northern District of California, at San Francisco.

[Endorsed]: Filed Mar. 26, 1917. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [69]

In the District Court of the United States, in and for the Northern District of California, First Division.

STEAMER AVALON CO., a Corporation,
Libelant,

vs.

The American Steamer "GENERAL HUBBARD," Her Engines, Boilers, Machinery, Tackle, Apparel, Furniture and Cargo,
Respondent.

Deposition of Charles A. Watts, for Respondent.

BE IT REMEMBERED, that on Monday, December 11, 1916, pursuant to stipulation of counsel hereunto annexed, at the office of Messrs. McCutchen, Olney & Willard, in the Merchants Exchange Building, in the city and county of San Francisco, State of California, personally appeared before me, Thomas D. Heyden, a United States Commissioner for the Northern District of California, to take acknowledgments of bail and affidavits, etc., Charles A. Watts, a witness called on behalf of the respondent.

Ira S. Lillick, Esq., appeared as proctor for the libelant, and Ira A. Campbell, Esq., appeared as proctor for the respondent, and the said witness having been by me first duly cautioned and sworn

(Deposition of Charles A. Watts.)

to testify the truth, the whole truth and nothing but the truth in the cause aforesaid, did thereupon depose and say as is hereinafter set forth.

It is hereby stipulated and agreed by and between the proctors for the respective parties that the deposition of the above-named witness may be taken *de bene esse* on behalf of respondent, at the [70] office of Messrs. McCutchen, Olney & Willard, in the Merchants Exchange Building, in the city and county of San Francisco, State of California, on Monday, December 11, 1916, before Thomas D. Heyden, a United States Commissioner for the Northern District of California, and in shorthand by E. W. Lehner.

It is further stipulated that the deposition, when written up, may be read in evidence by either party on the trial on the cause; that all questions as to the notice of the time and place of taking the same are waived, and that all objections as to the form of the questions are waived unless objected to at the time of taking said deposition, and that all objections as to materiality and competency of the testimony are reserved to all parties.

It is further stipulated that the reading over of the testimony to the witnesses and the signing thereof is hereby expressly waived. [71]

C. A. WATTS, called for the respondent, sworn.

Mr. CAMPBELL.—Q. State your full name.

A. Charles Alexander Watts.

Q. What is your business? A. Master mariner.

(Deposition of Charles A. Watts.)

Q. How long have you been a master mariner?

A. Since 1888; 27 years.

Q. How long have you been a master mariner in the Pacific Coast trade? A. 15 years.

Q. In what character of business were you engaged during the most of those years?

A. In the foreign and coastwise trade.

Q. What classes of vessels?

A. Sailing ships and steamers.

Q. Were you master of the steam schooner "General Hubbard" in July, 1916, at the time she broke down off Cape Meares and was towed into the Columbia River by the steamer "Avalon"?

A. I was.

Q. Do you recall approximately the hour when you left the Columbia River on the afternoon or evening preceding the breakdown?

A. I think it was about 3:40 I left the Hammond Mill above Astoria at Tongue Point—that I left the dock.

Q. What time was it that night that you first knew that your machniery had broken down?

A. One bell, quarter to twelve.

Q. At that time, was the engine itself stopped?

A. No. The chief engineer came and reported to me that he would have to stop for an examination, as the journals were heated.

Q. Did you again start ahead after that examination? A. No.

Q. What was the trouble?

A. The chief engineer reported to me that the

(Deposition of Charles A. Watts.)

crank-shaft was broken short off between the intermediate and high.

Q. As soon as you were advised of the breakdown, what did you do with the steamer?

A. I immediately went in the engine-room to see where the breakdown was, talked the matter over with the chief [72] engineer, to see if he could not run under low pressure. He said no, it would be impossible for us to make any headway at all.

Q. Then what did you do?

A. I decided to throw up rockets to attract the lighthouse-keeper at Cape Meares to get me a steam tug; I thought they would know what steamer it was there at that time, and would telephone to the Hammond Lumber Company, and they would send out a tugboat from Astoria.

Q. What was the nearest lighthouse station?

A. Cape Meares.

Q. Approximately how far distant do you estimate that to be?

A. About twelve miles; from twelve to fourteen miles.

Q. Where did you expect them to telephone to?

A. I thought they would telephone to Tongue Point, to the Hammond Lumber Company.

Q. Where is Tongue Point with respect to Astoria?

A. It is about three and a half miles, I should say, above Astoria.

Q. What was the condition of the atmosphere at the time that you shot these rockets?

(Deposition of Charles A. Watts.)

A. Well, it was clear, overcast at times.

Q. Moonlight or dark?

A. At times it was moonlight; practically moonlight; you could see quite a piece, quite a distance.

Q. Could you see the stars overhead?

A. Oh, yes, at times.

Q. What did you do after you shot the rockets, the first rockets?

A. I waited for a while to see if Cape Meares would answer.

Q. What did you do?

A. (Continuing.) And send for some steam tug.

Q. Then what next transpired?

A. Well, I sent off several, and after that I seen a steamer slightly in shore, and she paid no attention to them; we sent off some more rockets, and finally the steamer turned around and came down on us, bore down toward us.

Q. What steamer did that turn out to be?

A. It turned out to be the steamer "Avalon," Captain Christensen.

Q. Was she loaded at the time?

A. No, I think she was light; I don't know whether she had any cargo on or not.

Q. Did she have any lumber on her?

A. No lumber at all; she was **[73]** light.

Q. How did she train? Was she on an even keel?

A. No, set by the stern, quite a lot by the stern.

Q. Did her trim differ any from that usually taken by those wooden lumber-carrying vessels when they travel light?

(Deposition of Charles A. Watts.)

A. No, just about the same as all of them.

Q. What transpired between you and the master of the "Avalon" upon the latter coming up to the "Hubbard"?

A. I think, when he got alongside of me he asked me what the trouble was, and I told him a broken crank-shaft.

Q. What was said, if anything, with respect to his towing you to the Columbia River?

A. I asked him if he would tow me to the nearest port, Astoria.

Q. What did he say?

A. He said he would. I asked him what about an agreement, and he remarked something I could not hear. Then I took my megaphone and sung out plainly to him and asked him if it would be satisfactory to him if it be left to be settled by the owners, and if not by arbitration, and he says, "Yes, that is perfectly satisfactory to me"; and at the same time he sung out, "I will get my hawser ready, and come back as soon as I am ready to tow you."

Q. What did he do with the steamer after that?

A. He ran up ahead of us and laid there, and got his hawser ready; of course, he had to call the watch out, get the hawser ready, and after he got the hawser ready he came down and went around the lee side and up around to windward again, and then backed down again onto the bow.

Q. Onto which bow? A. Our port bow.

Q. Was that your lee or weather bow?

A. Lee bow.

(Deposition of Charles A. Watts.)

Q. How was the hawser made fast?

A. He hove a heaving line and it fell short; then I think we hove a heaving line and it fell short, and he hove another line, and if I remember rightly it fell short, **[74]** and we again hove ours and they caught our heaving line; we hauled the hawser aboard and made it fast.

Q. What is the approximate length of these heaving lines?

A. I should say a heaving line would be about 70 feet, about ten or twelve farthoms.

Q. Did they succeed in fastening the hawser?

A. Yes, we had no trouble whatever, after we got the heaving line.

Q. Where was it made fast on your steamer?

A. I made it fast to the bitts and took it back to the foremast.

Q. What did he do after the hawser was made fast? A. He went ahead and started for Astoria.

Q. What, if anything, transpired during the towage up to the time that you reached the Columbia River whistling-buoy, we will say?

A. Nothing at all; the weather moderated, died out to a calm; we had light rains at times passing Cape Meares.

Q. At the time you broke down and the time the "Avalon" came to you, what was the condition of the weather and sea?

A. The wind was about, I should say, about north northwest, with a moderate sea, you know, and passing clouds at times.

(Deposition of Charles A. Watts.)

Q. What do you mean by a sea, one with white-caps or without?

A. No, a moderate sea; the sea was very moderate, very quiet.

Q. Describe it in detail as well as you can so that the court may grasp it?

A. It was blowing about, what I would call a 5 knot breeze at the time.

Q. How was the surface of the water; what was its condition?

A. Well, it was what we call moderate, what we describe as a moderate sea.

Q. Do you make a distinction in your description between sea and swell?

A. Oh, yes; there is quite a lot of difference between sea and swell. **[75]**

Q. Was this a sea or swell?

A. It was a swell; a moderate northwesterly swell.

Q. What distinction do you make between a sea and swell?

A. A sea is a short sea, and a swell is one of those long rolling swells.

Q. Was there any water coming on to either of the steamers from the sea or swell that prevailed, as you have characterized it? A. None whatever.

Q. What was the "Hubbard" loaded with at the time? A. Lumber.

Q. How did she lay with respect to the line and the run of the swell?

A. We laid right in the trough, right in the trough

(Deposition of Charles A. Watts.)

of the sea—we were laying in the trough of the sea.

Q. As you lay there was there any danger in your judgment of losing your deckload?

A. No, none whatever.

Q. Approximately what time of day, and if you cannot recall, you are entitled to refresh your recollection from the log-book, did you get up to the buoys at the entrance to the Columbia River?

A. I should think it was about 4:10 or 4:15; shortly after 4 o'clock.

Q. Was there any difficulty experienced in towing the "Hubbard" up the entrance to the Columbia River? A. None whatever.

Q. Which side of the channel did the "Avalon" take?

A. Well, I will tell you: I do not consider the man was acquainted you know with the Columbia River—

Q. —That is not my question: Which side of the channel did the "Avalon" take?

A. He took the north side of the channel.

Q. What is the distance between the black buoys marking the northerly side of the channel and the red buoys marking the southerly side of the channel at a point opposite the end of the jetty, the south jetty? A. I should say about a mile.

Q. Was there any current experienced in the river? **[76]**

A. At the time that we were towing in the ebb was running, the ebb tide.

Q. Will you state whether or not captain at any

(Deposition of Charles A. Watts.)

time during the towage into and up the Columbia River there was ever any danger of either the "General Hubbard" or the "Avalon" swerving on to the jetty? A. None whatever.

Q. Were either of those vessels at any time close to the jetty?

A. No, not dangerously close; of course you pass the jetty pretty close; the channel is only a mile wide.

Q. At any time during the towing up the Columbia River was either vessel in any danger of stranding or going ashore? A. None whatever.

Q. What was the condition of the weather that prevailed during the day that you were being towed toward the Columbia River?

A. It moderated out to a calm with light rain at times.

Q. At the time that you crossed the Columbia River bar what was its condition?

A. The bar was perfectly smooth.

Q. Where did the "Avalon" take you to?

A. Well, when we got up to Fort Stevens "he took his megaphone and he asked me where I wanted to anchor; he said "I am not acquainted with the Columbia River and I have no chart"; so I told him, "All right." We shortened in our hawser and I told him I would megaphone him what time to slow down and I would let go the hawser, and I told him I was going to anchor between the Flavel Wharf and the jetties; so when we got up there I went forward with my megaphone and

(Deposition of Charles A. Watts.)

phoned him to slow down and he slowed down, and I let go of the hawser and sheered off to starboard and let go my anchor.

Q. After you anchored did you proceed up to Astoria with him?

A. The captain came alongside and asked me whether I was going to the city, and I thanked him very kindly and told him I was, and I **[77]** went up to the oil wharf with him; he was not acquainted or at least he said he was not acquainted in the Columbia River at all.

Q. Did you prepare an agreement which was subsequently signed by the captain of the "Avalon" with respect to this towage service?

A. I wrote up an agreement and got the captain to sign it.

Q. Will you state fully the circumstances under which the agreement was written out?

A. After we got up to the oil wharf, he asked me into his room, and I went into his room and I took over the copies of the agreement, that is, the agreement and the copies that I had written up, and I asked him if he would sign it so that I could have something to send to my owners to show what agreement I had made for salvage and towage in; he read it over and said there was nothing to it and signed it; I also signed it and gave him a copy, and I retained the two.

Q. I hand you what purports to be a copy of an agreement and ask you if this is a copy of it?

A. Yes, that is a copy of it.

(Deposition of Charles A. Watts.)

Q. Now, Captain, at the taking of the deposition of the mate the suggestion was made that this log-book which I show you, which has been marked Respondent's Exhibit 1 was not the regular log-book of the ship but was one that had been made up?

A. No, it is the log-book.

Q. Just a moment now—either independently of the ship's regular log or a copy from the log, the regular log. I will ask you whether or not that is the fact?

A. That is the regular log of the ship.

Q. Will you look at it please, where the entries commence July 15? A. This is the regular log.

Q. When was that log written up, all at one time or when?

A. No, he writes it up every day.

Q. Who writes it?

A. The chief officer writes that log. **[78]**

Q. Have you produced the log which precedes that one? A. Yes.

Q. Do I hold it in my hand?

A. You have it in your hand.

Q. The last entry in this log that I have in my hand is voyage 91 ending July 14, 1916, 12 P. M.

A. This one starts Saturday morning.

Q. What log is this I have in hand now?

A. That is the log-book from the previous voyage starting from the Atlantic or wherever it starts from. It starts, I think from the Atlantic on the voyage to Mexico.

Q. Will you explain why it was that on July 15th

(Deposition of Charles A. Watts.)

you started your entries in this log-book marked Libelant's Exhibit 1?

A. Yes; we had some damaged sugar.

Q. When?

A. On one of our trips East, along in February, and Mr. Hammond requested this log-book to be left ashore for extending the protest.

Q. That is the log-book which ends with July 14?

A. Yes, voyage 91, ending July 14, 1916. This log-book was ashore and this was a new log-book that I took for the beginning of the voyage.

Q. On July 15? A. On July 15.

Q. Will you show us in the old log-book some of the entries that had to do with this sugar damage that occasioned this being retained ashore?

A. Here it is, where it is signed by the chief officer and myself.

Q. That is on voyage 86? A. Voyage 86.

Q. January 25, 1916?

A. January 25, 26 and 28. These dates are in the extended protest, you can see, for the damaged sugar.

Q. I notice on January 25, 26 and 28 there appears your signature, Charles A. Watts, Master and G. W. Johnson, Chief Mate, and I notice those signatures do not appear on each day throughout the book. What significance do they point to? [79]

A. Well, I always in case anything occurs out of the ordinary have it signed by myself and chief officer, in case of any dispute of any kind; on this occasion you will find the pilot house book signed.

(Deposition of Charles A. Watts.)

Q. In the log-book which has already been offered in evidence as Libelant's Exhibit "I" commencing July 15th I note no signatures until we come to July 24 and then appears your signature "Charles A. Watts, Master," on the 24th and 25th; what explanation do you make of your having signed those places?

A. That was on account of the accident?

Q. On account of the accident?

A. Yes; the pilot-house log-book is also so signed, in case the officers are away at any time, we have got their signatures to whatever they enter into it.

Q. The question has been raised as to the meaning of this lead-pencil line in the margin of this first log-book. Do you know who made the marginal lead-pencil line? A. I can't explain that.

Q. Have you ever delivered this log-book into the hands of the average adjusters? A. No.

Mr. CAMPBELL.—I offer in evidence the log-book covering the dates from the 18th of December, 1915, to July 14, 1916.

Mr. LILLICK.—We object to the earlier entries in evidence on the ground that they are not material.

Mr. CAMPBELL.—They are not offered in proof of anything recited in there, but they are offered to meet the insinuations which counsel admitted and frankly stated on his last hearing he was making with respect to the log-book commencing July 15.

(The log-book is marked Respondent's Exhibit 2.)

Q. Now, Captain, I will ask you whether or not your steamer was in any danger whatsoever from

(Deposition of Charles A. Watts.)

her disabled condition from the time that she broke down until she was towed into the Columbia River?

A. She was in no danger whatever at any time.

[80]

Q. It is alleged in the libel brought in this case that the steamer "Avalon" proceeded to tow the said steamer "General Hubbard" to the said port of Astoria, Oregon, and on account of the strong current at the Columbia Bar had great difficulty in so towing said steamer "General Hubbard" as, by reason of the said strong current said vessels were laboring heavily, and both of said vessels were at said place in a perilous position. I will ask you whether it is a fact that at any time during the performance of this towage service either of these vessels labored heavily at all? A. It is not.

Q. Now, are you acquainted with the master of the said steamer "Avalon"?

A. Yes, I met him for the first time at the time of the accident.

Q. What was his name, do you remember?

A. Well, his last name was Christensen; I could not tell you his first name; it is the first time I had ever met him.

Q. I will ask you if at any time subsequent to the rendition of this service you had any conversation with the master of the "Avalon" in which he told you that he had sold any claim that he might have had for performing this service to the steamer Avalon Company?

A. When I was in San Pedro discharging, a long

(Deposition of Charles A. Watts.)

distance telephone came for me, and I went up to answer it, and it was from Captain Christensen; the "Avalon" was at Redondo; he asked me if I could supply him with a second officer or one of my officers to go as second mate. I told him I would see them and let him have one if he would go. He said his ship would be liable to a fine if she sailed without one; so I went aboard the ship and asked my officers; my third officer agreed to accept the position; I called him up on the phone and told him I had a second officer, and I would come down with the second officer to Redondo beach and be there at noon; he said he [81] sailed at one o'clock; on going down Captain Christensen met us at the head of the wharf and invited me aboard to have dinner. At the table most of the conversation was with regard to the towing in and the salvage, and the captain remarked that everything was all settled up as the owners of the "Avalon" had allowed all the crew one-half a month's salary, and that they were perfectly satisfied; the officers and engineers were at the table at the time.

Mr. LILLICK.—We ask that the last answer go out so far as it applies to what the captain was told by the captain of the "Avalon" with reference to the salvage end of it so far as the crew are concerned, being all settled up, and all that follows in the answer.

Mr. CAMPBELL.—Now, at this time we demand the production of any agreement and receipt or writing that has been taken by the steamer Avalon Com-

(Deposition of Charles A. Watts.)

pany or the Hart-Wood Lumber Company or any of the officers of either of the companies or by any officer or agent or person interested in the steamer "Avalon" covering any payment made to the master, officers or crew of the steamer "Avalon" on account of compensation for services rendered by members of the crew of the "Avalon" in towing the "General Hubbard" into the Columbia River.

Mr. LILLICK.—Subject to the instruction of the Court we will produce every document in connection with this matter that the Court instructs us to produce, upon the trial of the case.

Cross-examination.

Mr. LILLICK.—Q. Captain, do you remember that when the "Avalon" and the "Hubbard" were opposite the south jetty you stopped there for about half an hour?

A. No, we did not stop at all; we did not stop at all on the way, but we were going very slow; there was no time that we stopped. [82]

Q. There was a time while the two vessels were opposite the south jetty when the "Avalon" was making no headway against the ebb tide there, was there not? A. Not to my knowledge.

Q. Don't you remember that when you got—

A. —She always had headway.

Q. Well, don't you remember when you got opposite that south jetty the vessels practically stopped; they might have had headway in that the tide coming against you held you up, but you do remember, do you not, when you were opposite that south jetty

(Deposition of Charles A. Watts.)

you were practically stopped for about half an hour?

A. We were not stopped at any time during the voyage; the tide was running pretty strong but we were always moving over the ground; we were going very slowly, but we were not stopped.

Q. You say you were not stopped; about how fast were you going, at what headway, opposite the south jetty, in your judgment?

A. I suppose, in my judgment we were going, I should say, about a mile and a half an hour; there was no time that we were actually stopped, you know.

Q. How far were you from the end of the south jetty at that time when you were making such slow headway?

A. I should say it was about ¾ of a mile; we were favoring the north shore, favoring the north bank.

Q. Would you say you were ¾ of a mile away from the end of the jetty at the nearest point?

A. At the nearest point.

Q. At which you approached it? A. Yes.

Q. The river was 20 or 22 feet above normal height, was it not, when you went in?

A. I would not say exactly; I could not say.

Q. When did you write out the agreement that you had the captain of the "Avalon" sign?

A. The next morning when we were towing. [83]

Q. While you were on the way up? A. Yes.

Q. Did you discuss that with your first officer?

A. The agreement?

Q. Yes.

(Deposition of Charles A. Watts.)

A. Not at all, no, but after writing it out I read it to him.

Q. Did you make any changes in it?

A. None whatever.

Q. Do you remember having told the captain of the "Avalon" after you had asked him to sign the agreement that you had written out that he could telephone to his people at Willapa and if he were liable to get into trouble for having signed that that you would tear your copy up and he could tear his copy up?

A. That is perfectly right; on the way up to the telegraph station Captain Christensen remarked to me that it would be the cause of his losing his position with the Hart-Wood Lumber Company, through his signing such an agreement; I told him, I remarked to him then, I said "Captain Christensen, you telegraph or telephone to your owners in Willapa Harbor and if they tell you you have done wrong," I said, "we will destroy it." I says, "I do not want to be the cause of your losing your position by towing me into Astoria."

Q. You testified in your direct examination that Cape Meares lighthouse was, you estimated, 12 or 14 miles off, where the vessel was lying when you first sent up the rockets? A. Yes.

Q. Could you see the lights from where you were?

A. Yes, all the time.

Q. You got no reply from the lighthouse?

A. No, they never answered at all.

Q. What rockets did you send up first?

(Deposition of Charles A. Watts.)

A. I sent up the ordinary rockets, you know, the ordinary rockets that burst in stars.

Q. How many did you send up the first time? [84]

A. I could not tell you how many I sent up; I used to send one up every 15 or 20 minutes.

Q. Didn't you send up first 3 or 4 in rapid succession and then wait a little while?

A. No, I never done that at any time; I sent them myself, too.

Q. You sent up one?

A. One; and then after sending up one rocket I burned a blue light.

Q. Then you waited for 15 minutes?

A. Yes, 15 or 20 minutes.

Q. In the meantime you received no answering rocket? A. Received no answer at all.

Q. Then you sent up another rocket, burnt another light and no answer? A. Yes.

Q. And then the third time you saw the lights of the "Avalon," did I understand you?

A. Well, I think it was more than that; it was the fourth or fifth time before we saw the lights of the steamer which afterwards turned out to be the "Avalon."

Q. Then she finally answered with a search light, did she not?

A. She did; she passed us and after she got past us Captain Christensen told me that the second officer, who was on deck did not see our signal, and when the mate came on deck he seen it. He was away

(Deposition of Charles A. Watts.)

past, he was past 2 or 3 miles at the time of seeing the signal.

Q. Had you seen her as she was going by?

A. Yes.

Q. How far away did she pass you?

A. I presume she would be about 3 or 3½ miles inshore of us.

Q. Did you burn blue lights while she was going by you? A. Yes.

Q. How far were you from the nearest point on shore at that time?

A. Cape Meares was the nearest; I think it was about 14 miles at the time the "Avalon" passed.

Q. Was the lighthouse directly inshore from you? [85]

A. Yes, sir, it bore northeast quarter east, if I remember rightly.

Q. The shore then was directly abeam?

A. Cape Meares was the nearest point of land to us; it kind of goes in on a curve, the coast coming down.

Q. How does the current set there?

A. It generally runs with the wind; with a northerly wind, that would make the current run to the southward, and with a southerly wind it will change to the northward.

Q. At this time it was setting south, was it?

A. There was practically no current at all, because the wind had not been northerly long enough time.

Q. Was it not blowing from the north when you left the river?

(Deposition of Charles A. Watts.)

A. There had been hardly any wind at all from the time I left the river.

Q. The wind had not increased any from the time you left? A. No.

Q. Isn't there a regular current setting up and down the shore in here?

A. Inside of the 3-mile limit, yes.

Q. But not outside?

A. No regular current on the coast; the currents on this coast depend entirely on the wind; after the wind has been blowing any length of time from the north the current will start running to the southward and *vice versa.*

Q. Now, that current inside the 3-mile limit, which way does it set?

A. It sets in and off of the shore.

Q. Do you know how that current was setting at this time?

A. Practically speaking I do not think we had any.

Q. Within the 3-mile limit, I mean?

A. No, I mean where we were.

Q. I am speaking of the current inside of the 3-mile limit? A. I don't know. [86]

Q. You had a full deckload on, Captain?

A. Yes, a full deckload.

Q. Were loaded down to your loading lines?

A. Yes, loaded down to the loading lines.

Q. You had no wireless on the "General Hubbard," did you? A. No, no wireless.

Q. Had you attempted to rig up any sort of sails

(Deposition of Charles A. Watts.)

to keep your head up to the sea before this, Captain?

A. No, she came right up; there was no need of any.

Q. She was lying broadside to the swell?

A. Right in the trough of the sea, but she was not lying quite broadside; the sea was about 6 points on the bow; with all the sails or even with steam you could not keep her in a better position. The sea was just breaking on the bow about 6 points.

Q. What kept you in that position from the swell?

A. The weight of the ship; there was not enough sea.

Q. There was a moderate swell, was there not?

A. A moderate swell and moderate sea; it was not ever changed; she changed her head from south southwest to west southwest, 4 points.

Q. You mean she was just wallowing around in the sea? A. She was not.

Q. She had no headway at all, had she?

A. Practically speaking no; she might have had about, I should judge, ½ a knot of a drift—drifting down about south by west.

Q. So that the current was then setting down about ½ a knot an hour, would you say?

A. No, it was not the current; it was the wind and the sea; I suppose, you know, there might have been a light current, but there was none, you know, distinguishable.

Q. What I am getting at, Captain is, the vessel was without any motive power at all?

(Deposition of Charles A. Watts.)

A. Yes. [87]

Q. I would assume that she would lie in the trough of the sea, and yet you say she was quartering up toward the sea. What kept her in that position?

A. She comes up; a vessel will never lie steady, without she had lines to moor her there; she will always fall off and come to; she will never stay in the same place.

Q. She was lying in the trough of the sea?

A. She was lying practically speaking in the trough of the sea.

Q. You spoke of one of the vessels setting down by the stern; was that the "Avalon" or the "Hubbard," on your direct examination?

A. The "Hubbard" was, I think, about 12 inches by the stern, but the "Avalon" was about 2 feet or so by the stern—I should say about 3 feet by the stern.

Q. You also said on your direct examination, that there were light rains as she was passing Cape Meares: is that correct?

A. Yes, passing rain squalls at times.

Q. Captain, you do not mean to have us understand that that bar was perfectly smooth and that any swell was not perceptible at the bar, do you?

A. I do. There was no swell on the bar whatever, perfectly smooth.

Q. Now, as to this log-book, Captain: when did your owners ask you to turn in the old log-book, do you remember?

A. Yes, the day I finished discharging the lighter

(Deposition of Charles A. Watts.)

July 14th or whatever date it is.

Q. The day the log-book states?

A. Yes, I had to take it to the Hammond Lumber Company's office and they sent me that new book aboard. [88]

Q. You said that this book was written up every day. You did not see this mate write this all up, did you?

A. No, he writes that up from the pilot-house log.

Q. You don't know of your own knowledge that he wrote that up every day? You only know he ordinarily writes it up every day?

A. He ordinarily writes it up every day. I know of my own knowledge that all of these days that these entries were signed by me it was written up.

Q. You signed these entries on different days, and not on the same day, Captain?

A. No, I signed these entries all the same day.

Q. These two entries of the 24th and 25th you signed on the same day? A. Yes.

Q. And that was on the 25th, was it, or later?

A. I don't know; whatever date I have there.

Q. One is the 24th and the other is the 25th; you don't remember whether you signed that on the 25th or some other day?

A. No; I think I signed it the day that we arrived there; the 26th it was signed, I guess, just before we got in the Columbia River, I think, if I remember rightly.

Q. Captain, wasn't there some danger of the hawser getting foul of the propeller of the "Avalon"

(Deposition of Charles A. Watts.)

when they started to make that tow?

A. Not at all.

Q. Why not?

A. None whatever, unless it be through the carelessness on board of the "Avalon."

Q. Why not?

A. It is impossible for it to get there. I don't think the captain would back the steamer with the hawser over the stern.

Q. The "Avalon" was under way all the time, was she not? A. Under way all the time?

Q. Her wheel was going during all the time you were throwing the [89] heaving line?

A. No, I do not think so. Her wheel was stopped, because we were not going when heaving the heaving line.

Q. Did he come in within 70 feet and not have his wheel going one way or the other?

A. Certainly—he certainly did; and he didn't start his wheel until I sung out and told him to go ahead from the bridge.

Q. He backed into you?

A. He backed into my lee bow.

Q. And then just laid there?

A. Just laid there.

Q. And then from the time you first commenced throwing those lines, it is your idea that his wheel was not going at any time until you sung out to him "Go ahead"?

A. Well, that is what I think; I am sure his wheel was not going; I sung out and told him to go ahead

(Deposition of Charles A. Watts.)

after the hawser was made fast.

Q. I am speaking of from the time when he first backed in there and first, as I understand it, he threw his heaving line to you, and then there was one from your vessel to his, and then another one from his to you, and then one from your vessel to his again?

A. Yes.

Q. During all that time it is your idea that his wheel was not going?

A. His wheel was not going, yes.

Q. Have you ever performed a salvage service on this coast yourself, Captain?

A. No, but I have towed sailing ships from here to the canal, one 2,000 ton ship, with 4,000 tons of cargo, to Balboa, with the "General Hubbard," a year ago last February.

Q. What is the character of the anchorage ground off that point where you were when the "Avalon" picked you up?

A. It is a good anchorage ground all along that coast, down to Cape Blanco.

Q. Between Cape Meares and Cape what?

A. Between Columbia River and Cape Blanco, you can anchor any part of the coast.

Q. That is, if you are inshore close enough?

A. Yes.

Q. You had no way to get assistance to you except by these rockets [90] and burning lights, had you?

A. Yes; what I was going to do the next morning was to send my boat ashore to Cape Meares; I was

(Deposition of Charles A. Watts.)

not going over half a knot, drifting, and at daylight I figured I would only be about 15 miles from Cape Meares lighthouse.

Q. You were 14 that night?

A. Yes, supposed to be; between 12 and 14.

Q. You would have been drifting on south?

A. We would have drifted about south by west, as near as I could tell you.

Q. Would you have been farther away than 15 miles, or not?

A. No; you see, it was one o'clock in the morning, and it is daylight at half past five, which would have been only two miles drift—between two and three.

Q. Aren't almost all vessels of the size of the "Hubbard" on the coast equipped with wireless?

A. No. The law requires any ship carrying a crew complement of over 50 men to be equipped with wireless. Our complement was 26, I think—unless in the passenger trade.

Q. What was the draft forward and draft aft?

A. I could not tell you.

Q. If it is in the log-book, will you get it?

Mr. CAMPBELL.—Forward 17–8; aft 19–1, under date of July 24.

Redirect Examination.

Mr. CAMPBELL.—If there had been any danger to either of these vessels in proceeding into the Columbia River at the time that you reached the entrance, was there anything to have prevented either or both of them anchoring there?

A. No, nothing at all.

(Deposition of Charles A. Watts.)

Q. Have you ever anchored off the Columbia River entrance?

A. Certainly, I do all the time, when there is thick fog or anything, or a strong ebb; I anchor and wait until the change of tide. In this case, if I had been the captain of the "Avalon," I would have waited two hours and gone in with the flood tide. [91]

Q. If he had remained out there two hours longer, what would have been the condition of the current in the river then?

A. That would have been at a flood, I think in about two hours and a quarter.

Q. What two tugs are maintained at the entrance to the river by the port of Portland?

A. The " Wallula," and I forget the other one—the "Oneonta."

Q. Are they sea-going tugs?

A. Both sea-going tugs; the "Oneonta" towed me to 'Frisco.

Q. After this? A. When I left Astoria.

Q. What kind of anchors did the "General Hubbard" have? A. Patent anchors.

Q. Do you know their weight?

A. About two ton; I think the weights are about 4,250 pounds, if I remember rightly.

Q. What can you say of the capacity of the anchors to hold the "General Hubbard" if she had found it necessary to have anchored anywhere along the coast at that time?

A. She had good ground-tackle, and three spare anchors.

(Deposition of Charles A. Watts.)

Q. If there had been any head sea, what is your judgment as to whether or not the "Avalon," in her condition, could have towed the "General Hubbard" loaded against it?

A. If there had been any sea to speak of at all, the "Avalon" could not have towed us; she would have had to let go.

Q. Did Captain Christensen ever subsequent to your conversation with him on the way to the telegraph office, ask you to destroy your copy of this agreement?

A. Not at all; he says to me, he put it to me this way: "Captain, through my signing this agreement," he says, "You will make me lose my position with the Hart-Wood Lumber Company.

Q. You testified that he told you that if on communicating with his owners he found he was going to get into difficulty, or words to that effect, you would tear up your copy of the agreement. Did he [92] ever ask you to tear up your copy of the agreement?

A. No, he never asked me.

Q. Did he ever since protest to you against the agreement which he had signed? A. No, never.

Q. During your cross-examination, when describing the position of the "General Hubbard" in the trough of the sea, you used the expression that the sea was breaking under her bow. What do you mean by "breaking"?

A. The sea was just breaking, you say?

Q. Did you say that?

A. No. It was a moderate sea. The sea came on

(Deposition of Charles A. Watts.)

her bow, about 6 points on her bow; she was not lying exactly in the trough; she was lying about two points in the trough of the sea, and then she would fall off the other way two points; sometimes the sea would be about two points on the bow and sometimes two points off of the beam.

Recross-examination.

Mr. LILLICK.—Q. The chances of your anchors holding, if you had attempted to anchor with the "Hubbard," would have depended, of course, upon how heavy the sea would have become, would it not?

A. Well, yes, in a way, certainly.

Q. Do you know the horse-power of the "Oneonta"?

A. Well, I did know, but I forget; no, I do not.

Q. You said a moment ago that the "Avalon" would not have been able to tow you in?

A. Yes.

Q. Do you know her horse-power?

A. I think the "Avalon" is 750—isn't that it?

Q. You don't know the "Oneonta's"?

A. The "Oneonta" is a different class of ship; one is built for towing and the other not. The "Oneonta," if I remember rightly, is 850 horse-power. One is built, of course, for towing, and the other not.

Q. Why didn't you tell the captain of the "Avalon" to wait until [93] the tide flooded there at the entrance, Captain?

A. You do not suppose I would try to tell another man his own business or what he is to do?

(Deposition of Charles A. Watts.)

Q. You ordered him to go ahead when the line was fastened on the "Hubbard"?

A. Certainly I did.

Q. You ordered him to throw your line off inside the river?

A. No, I did not; I told him I would let go of his hawser; I did not order him.

Q. Then your reason for not telling him to wait for the flood tide was simply because—

A. (Intg.) Because he was the master of the towing ship.

Q. (Contg.) Because you knew that he was towing your vessel? A. Certainly.

Q. And he was in charge? A. Certainly.

Q. How long had it been before this that you had been in the Columbia River?

A. I could not say exactly; the log-book will show. I think about 16 days or 18 days before that.

Q. Eighteen days before you had been in there?

A. Loading.

Q. So you didn't know when there was going to be flood tide at the Columbia River?

A. I didn't know, you say?

Q. Yes.

A. What are you talking about? Certainly I did. Didn't I know when it was flood? Didn't I have the tide-books? He didn't know, the captain of the "Avalon" didn't know.

Q. You didn't know, Captain, that there would be a flood tide there in two hours from the time you were there at the south jetty?

(Deposition of Charles A. Watts.)

A. Certainly I did.

Q. So that it is your testimony that there would have been a flood tide and the water setting in at that south jetty two hours after you had been there?

A. About two hours, or two hours and a quarter afterwards. **[94]**

Q. Did the "Hubbard" have a hawser aboard?

A. Yes.

Q. How long was it?

A. I had 140 fathoms, I think.

Q. Of what size?

A. 14-inch, with a wire towing spring.

Mr. CAMPBELL.—Q. What was the size of the hawser that they used?

A. I think the one we used was about 12-inch—10 or 12-inch. **[95]**

United States of America,
State and Northern District of California,
City and County of San Francisco,—ss.

I certify that, in pursuance of stipulation of counsel, on Monday, December 11, 1916, before me, Thomas D. Heyden, a United States Commissioner for the Northern District of California, at San Francisco, at the offices of Messrs. McCutchen, Olney & Willard, in the Merchants Exchange Building, in the city and county of San Francisco, State of California, personally appeared Charles A. Watts, a witness called on behalf of respondent, in the cause entitled in the caption hereof, and Ira S. Lillick, Esq., appeared as proctor for libelant, and Ira A. Campbell, Esq., appeared as proctor for re-

spondent; and the said witness being by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in said cause, deposed and said as appears by his deposition hereto annexed.

I further certify that the deposition was then and there taken down in shorthand notes by E. W. Lehner, and thereafter reduced to typewriting; and I further certify that by stipulation of the proctors for the respective parties, the reading over of the deposition to the witness and the signing thereof was expressly waived.

Accompanying said deposition and referred to and specified therein is Respondent's Exhibit 2.

And I do further certify that I have retained the said deposition in my possession for the purpose of delivering the same with my own hands to the clerk of the United States District Court for the Northern District of California, the court for which the same was taken.

And I do further certify that I am not of counsel, nor attorney for either of the parties in said deposition and caption named, [96] nor in any way interested in the event of the cause named in the said caption.

IN WITNESS WHEREOF, I have hereunto set my hand in my office aforesaid this 26 day of March, 1917.

[Seal] THOMAS E. HAYDEN,
United States Commissioner, Northern District of California, at San Francisco.

[Endorsed]: Filed Mar. 26, 1917. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [97]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,075.

STEAMER AVALON COMPANY,

Libelant,

vs.

The American Steamer "GENERAL HUBBARD," Her Engines, Boilers, Machinery, Tackle, Apparel, Furniture and Cargo,

Respondent.

HUBBARD STEAMSHIP COMPANY, a Corporation,

Claimant.

No. 16,110.

J. L. CHRISTENSEN, J. CARLSON, W. J. BECK, P. RODLAND, A. LINDBERG, CARL LINDBURG, H. PETERSEN, T. G. ECKHART, OTTO ANDERSEN, A. AELFORD, N. SAASTED, H. MILLER, NICK MATHIESON, A. RAJAHN, L. CHRISTENSEN, K. LARSEN, OLE ANDERSON,

H. ANDERSON, JULIUS STROM, TALBERT PREWETT, JOHN GAILEY, FRED LUNDIN and AUG. LOWREYS,

Libelants,

vs.

HUBBARD STEAMSHIP COMPANY, a Corporation, and HAMMOND LUMBER COMPANY, a Corporation,

Respondents.

Stipulation Re Taking Deposition of O. S. Wickland.

IT IS HEREBY STIPULATED by and between the undersigned proctors for the respective parties to the above-entitled causes that the deposition of O. B. Wickland may be taken in the city of Astoria, State of Oregon, before Edwin Judd, a [98] Notary Public for Oregon, as a commissioner, without the issuance of a commission for that purpose, upon this stipulation, on Tuesday, the 20th day of March, 1917, at the hour of ten A. M.

AND IT IS FURTHER STIPULATED that upon the completion of the taking of said deposition the same shall be by said notary returned to the Southern Division of the United States District Court for the Northern District of California, First Division, anld may be offered in evidence on behalf of any of the parties to the above-entitled causes, subject to objections only as to the materiality, relevancy or competency of any of the questions propounded or the answers made thereto by the said witness.

Dated at San Francisco, California, this 13th day of March, 1917.

IRA S. LILLICK,
Proctor for Libelants.

McCUTCHEN, OLNEY & WILLARD,
Proctors for Claimant and Respondent. [99]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

IN ADMIRATY—No. 16,075.

STEAMER AVALON COMPANY,
Libelant,

vs.

The American Steamer "GENERAL HUBBARD," Her Engines, Boilers, Machinery, Tackle, Apparel, Furniture and Cargo,
Respondent.

HUBBARD STEAMSHIP COMPANY, a Corporation,
Claimant.

No. 16,110.

J. L. CHRISTENSEN, J. CARLSON, W. J. BECK, P. RODLAND, A. LINDBERG, CARL LINDBURG, H. PETERSEN, T. G. ECKHART, OTTO ANDERSEN, A. AELFORD, N. SAASTED, H. MILLER, NICK MATHIESON, A. RAJAHN, L. CHRISTENSEN, K. LARSEN, OLE ANDERSON,

H. ANDERSON, JULIUS STROM, TALBERT PREWETT, JOHN GAILEY, FRED LUNDIN and AUG. LOWREYS,

Libelants,

vs.

HUBBARD STEAMSHIP COMPANY, a Corporation, and HAMMOND LUMBER COMPANY, a Corporation,

Respondents.

Stipulation Re Deposition of O. S. Wickland, etc.

It is hereby stipulated and agreed by and between the above-named libelants, through their respective proctors, and the above-named claimant and respondents, through their respective proctors, that the testimony and evidence of O. S. Wickland this day taken before Edw. C. Judd, of Astoria, Oregon, a notary public, shall not be signed by said O. S. Wickland, being inconvenient for said witness to sign the same, and that the same may be certified to by the said Edw. C. Judd, as notary, before whom the said [100] testimony and evidence was taken, the same as if actually signed by and subscribed by said witness, and that the same shall have the same force and effect as if actually subscribed to by such witness, and no objection shall be made to the offer or receiving or reading of said deposition of said witness in evidence because of the fact that the same was not subscribed by him, and that the same may be received and read in evidence at the trial of the above-entitled cause in the above-entitled court, or such other court, as the said cause may be heard, the same as if the

same had been actually subscribed by such witness.

Dated at Astoria, Oregon, this 20th day of March, A. D. 1917.

IRA S. LILLICK,
FRANK SPITTLE,
Proctor for Libelants.
McCUTCHEN, OLNEY & WILLARD,
By G. C. FULTON,
Proctors for Respondents and Claimants. [101]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

IN ADMIRALTY.

STEAMER AVALON COMPANY,
Libelant,

vs.

The American Steamer "GENERAL HUBBARD," Her Engines, Boilers, Machinery, Tackle, Apparel, Furniture and Cargo,
Respondent.

HUBBARD STEAMSHIP COMPANY, a Corporation,
Claimant.

J. L. CHRISTENSEN, J. CARLSON, W. J. BECK, P. RODLAND, A. LINDBERG, CARL LINDBURG, H. PETERSEN, T. G. ECKHART, OTTO ANDERSEN, A. AELFORD, N. SAASTED, H. MILLER, NICK MATHIESON, A. RAJAHN, L. CHRIS-

TENSEN, K. LARSEN, OLE ANDERSON, H. ANDERSON, JULIUS STROM, TALBERT PREWETT, JOHN GAILEY, FRED LUNDIN and AUG. LOWREYS,

Libelants,

vs.

HUBBARD STEAMSHIP COMPANY, a Corporation, and HAMMOND LUMBER COMPANY, a Corporation,

Respondents.

Deposition of O. S. Wickland, for Respondent.

BE IT REMEMBERED that on Tuesday, the 20th day of March, 1917, pursuant to the stipulation hereunto attached, there appearing before me, Edw. C. Judd, a notary public in and for the State of Oregon, being the same party named in the stipulation as Edwin Judd, at my office at Astoria, Clatsop County, Oregon, the libelants herein, by their proctor, Frank Spittle, Esq., and the claimant and respondents by their proctor, G. C. Fulton, Esq, There also at the same time and place appeared before me O. S. Wickland, being the same party named in the stipulation as O. B. Wickland, a witness on behalf of claimant and respondents, who being by me first duly cautioned and sworn to tell the truth, the whole truth and nothing but the truth, testified as follows, that is to say: [102]

(Interrogated by Mr. G. C. FULTON.)

Q. State your name, age, residence and occupation.

A. O. S. Wickland; age, 48; residence, Hammond,

(Deposition of O. S. Wickland.)

Oregon; occupation, Keeper of U. S. Coast Guard.

Q. At what point is your station located?

A. Three-quarters of a mile southeast of the Ft. Stevens Military Reservation.

Q. In the State of Washington?

A. In the State of Oregon.

Q. What position do you occupy in this Coast Guard?

A. I am in charge of the station; keeper of the station.

Q. How long have you been such keeper?

A. Twenty-one years.

Q. At this same location?

A. No, I have been keeper of this station for nineteen years.

Q. How long have you been in the Coast Guard?

A. Twenty-six years.

Q. What occupation did you follow prior to entering the Coast Guard Service?

A. Fisherman and sailor.

Q. What experience have you had as a sailor?

A. I have been sailing since I was a little boy. I might say from the time I was nine years old, with the exception of the time spent at school. I spent all my life at sea.

Q. Whom were you sailing with in your youth?

A. I sailed for a time with my dad and with my stepdad.

Q. What positions did they occupy on the vessel?

A. Both masters.

Q. Are you a master mariner? A. No, sir.

(Deposition of O. S. Wickland.)

Q. How many years have you actually followed the sea?

A. Altogether from the time I was fourteen years until I was twenty-one, I might say, I followed the sea.

Q. From what ports have you sailed? [103]

A. Mostly from ports in the Scandinavian country.

Q. To what ports?

A. Most all the ports of Scandinavia and Great Britian as well.

Q. Were you keeper of the Coast Guard Station you have just mentioned on the 24th and 25th days of July, 1916? A. Yes, sir.

Q. Did you see the steam schooner "Avalon" about that time?

A. On the 25th; yes, sir.

Q. 25th of July, 1916? A. Yes, sir.

Q. What vessel, if any, had she in tow at that time? A. The "General Hubbard."

Q. State in your own way, Captain, where you first saw these two vessels and describe the character of the weather and conditions what your observations were in regard to their movements.

A. As near as I can remember, the surfman on watch at the station reported at two o'clock P. M. that the "General Hubbard" hove in sight in tow of a steam schooner. The weather was clear at times, with occasional rain squalls.

Q. What did you do then, if anything?

A. Well, knowing that the "General Hubbard"

(Deposition of O. S. Wickland.)

had left the previous day for the south, I felt kind of uneasy because I knew there was something the matter with her when she hove in sight again, so I reported the matter to the Hammond Lumber Company.

Q. What I mean, what did you do, whether or not you went on the jetty to make further observations?

A. I didn't make any further observations because she was coming towards the bar.

Q. Did you observe it towed across the bar?

A. Yes, we could see she was in tow. I didn't personally, but the watchman reported to me.

Q. Did you see the steamer "Avalon" tow the "Hubbard" across the bar? A. Yes.

Q. About how wide is the Columbia River Bar at the mouth of the Columbia River? [104]

A. I couldn't say, Mr. Fulton, how wide the bar or the channel is. The chart will show that. I wouldn't want to make a statement because I might make a mistake.

Q. What are the facts in regard to the channel, that is, does the channel occupy practically all the space between the two jetties?

A. Not exactly. The channel doesn't occupy quite as large a space as that. There are spits on the north as well as the south jetty.

Q. What width are the spits?

A. I wouldn't like to say. I imagine the channel is more than a mile, between a mile and a mile and a half.

Q. Through what portions of the channel was this

(Deposition of O. S. Wickland.)

tow made? A. Through mid channel.

Q. Through the mid channel, you say?

A. Yes, sir. As far as I was able to make out.

Q. What was the stage of the tide, as you remember?

A. The current was still running out when she came in, but if I am not mistaken the tide was rising.

Q. From the observations you made at the time, did the "Avalon" have any difficulty making the tow? A. She did not appear to have.

Q. From the positions occupied by the "Avalon" and "Hubbard," what is your judgment as to whether or not either vessel was in any peril during the tow?

A. So far as I am able to understand, I couldn't see any particular peril.

Q. You use the word "particular."

A. We use that a great deal; maybe we shouldn't. I couldn't see that either of them was in any peril.

Q. Please describe the condition of the bar at the time. What, if any, crafts were navigating it,—if so, the character.

A. There were a number of small fishing boats.

Q. Going out mostly or coming in?

A. Coming in because the tide was turning and there was a little [105] swell on the bar, but it didn't seem to be any danger in going out or in over the bar for any sized vessel, so far as I was able to understand.

Q. Speaking of fish boats, what are their dimensions?

(Deposition of O. S. Wickland.)

A. All the way from twenty-five to thirty feet long.

Q. Operated by power or otherwise?

A. Operated by power, yes, sir.

Q. Mostly gasoline? A. Yes, sir.

Q. Were you on the bar at the time?

A. I didn't go as far as the bar; no.

Q. Did you meet the "Avalon" and "Hubbard"?

A. Near the end of the south jetty which is right inside the bar.

Q. Near the end of the south jetty? A. Yes.

Q. What was the condition of the sea and bar at that time? A. We call it a moderate sea.

Q. What character of craft were you in?

A. In the life-boat. Our life-boat.

Q. You experience any difficulty in navigating the water? A. Indeed not.

Q. About how many fish boats were navigating the bar at that time?

A. I couldn't state the number. There were a number of them.

Q. Where is Cape Meares lighthouse?

A. As far as I know, it is between three and five miles south of the entrance to Tillamook Bay. I am not quite sure as to that. The chart will show the exact place, I think.

Q. You know what communication Cape Meares has as to telegraph or telephone lines?

A. No, sir; I do not know.

Q. What are the facts as to whether or not it is your duty to observe vessels navigating across the

(Deposition of O. S. Wickland.)

bar both from sea and to sea?

A. It is our duties to observe.

Q. You have been following that for about nineteen years? [106]

A. For twenty-six years all together. I was surfman at the station for five years before.

Q. Taking into consideration the character of the tides, winds, and currents at the mouth of the river and bar, and the character of the sea at the time the "Avalon" towed the "Hubbard," at the time in question, what would you say, Captain, as to whether or not the seal conditions were favorable or unfavorable to a tow?

A. In my opinion the conditions were not at all unfavorable. I would call them favorable. Of course, it must be understood, I have seen better weather, because it was squally occasionally but as to conditions when vessels pass out and in we see them going out with vessels under more trying conditions.

Q. What I want to get is whether or not conditions were favorable or unfavorable?

A. In my opinion favorable.

Q. These squalls you speak of were they severe or light? A. They were not severe.

Q. In your judgment the squalls that prevailed that day have any effect on towing at all?

A. I didn't think it would have to any great extent.

I think that is all.

(Deposition of O. S. Wickland.)

(Interrogated by Mr. FRANK SPITTLE.)

Q. Captain Wickland, where were the "Avalon" and "Hubbard" when you first saw them?

A. About ten miles offshore, we were judging, about ten miles. In the southwesterly direction from the north jetty.

Q. And from the time you personally went out in the life-boat, they were then coming in over the bar, were they?

A. Yes. Not when we left the station they weren't up to the bar, but when we got there they were coming in over the bar.

Q. Do you know *exactly stage* of the tide it was when you met them at the bar?

A. I couldn't state exactly what stage of the tide it was, but we [107] met them between three and four o'clock, I think, as near as I remember. It was ebbing a little.

Q. It was still on the ebb?

A. The current was running out, but the current runs out after low water sometimes three and four hours.

Q. At that time, wasn't there quite a freshet in the river?

A. Yes, there is always a little freshet, not such a great deal.

Q. Now, are you testifying of July 25th, 1916?

A. Yes.

Q. There was quite a good deal of freshet at that time?

A. It might have been, yes, sir. There is always

(Deposition of O. S. Wickland.)

more or less freshet at that time of the year.

Q. What time of day you say you met them there?

A. As near as I remember, it must have been between three and four o'clock.

Q. Will you look at that tide-table? Tell me what time low tide was that afternoon.

FULTON.—I presume that the book, such as it is, or whatever it is, can speak for itself. I therefore object to the question unless the book is offered in evidence.

SPITTLE.—I simply offered that to refresh his memory.

A. That was 3:55. I couldn't say to the time, it might have been later. I couldn't say exactly to the *tide* I met the people, I suppose there is a record at the station, but I didn't want to go into the station records. Let me see; we returned to the station, if I am not mistaken, at six o'clock that evening. I took a message in for the captain, you know. It might have been later when we met her; I couldn't say.

Q. Well, then, the tide was still running out?

A. Yes.

Q. You say that when there is a freshet in the river that the tide runs out quite a while after low tide? A. Yes, it does.

Q. What causes a freshet? [108]

A. I have always understood that the snow in the mountains causes that.

Q. That is generally understood?

A. That is what I understand.

(Deposition of O. S. Wickland.)

Q. When snow is melting and there is a freshet in the river, how far offshore is that freshet felt?

A. I couldn't say. It depends on what direction you go from the river. If you go south of the bar a little distance, you don't feel it at all. If you go straight west, you feel it way beyond the lightship.

Q. Now, Captain, what are the prevailing winds at that time of the year?

A. It is generally northwest, but last year it was not so; it was mostly southerly winds.

Q. You know what the wind was on that day?

A. I think it was southwesterly.

Q. You remember where these squalls came from, what direction?

A. From the southwesterly direction, I think.

Q. Now, right off the bar where current sets out, what is the direction of the coast current?

A. The coast current in the summer-time generally follows the wind. If it is northerly wind the current sets south and if it is southerly wind the current sets north.

Q. Now, you say that when the "Avalon" came in with her tow, they were approximately in the middle of the channel?

A. As far as I was able to understand, yes.

Q. You say there was a moderate sea?

A. Yes.

Q. What was the rate of the wind at that time that afternoon?

A. Well, I couldn't state exactly the velocity of the wind, but it was not very strong.

(Deposition of O. S. Wickland.)

Q. Are you familiar with the Beauford scale of winds? A. Yes.

Q. What number would you say it was that afternoon? [109]

A. Well, I would say from one to three.

Q. It wouldn't be above three?

A. No, I wouldn't swear to that, Mr. Spittle, but I think that was about what we would rate it.

Q. Take the squalls, what was it?

A. About that time it would be three. When the squalls were not coming in, it was almost calm at the station.

Q. I mean at the bar?

A. I couldn't tell you.

Q. When you were at the bar and met the "Hubbard" and "Avalon" coming in, what was it?

A. About the same.

Q. Now, you say, Captain, that the channel is approximately a mile wide at the south jetty?

A. Well, I stated that, but I didn't want my judgment of that taken for granted. The chart will show exactly. I could only refer to the chart in case of that kind.

Q. Tell me what the jetty from the end, there for a considerable distance, we will say two miles from the end of the jetty consists of, or did consist of at that date.

A. The jetty consists of rock. Rock and piling, of course.

Q. Well, that piling at the present time and at that time, what was the condition of it.

(Deposition of O. S. Wickland.)

A. For a considerable distance from the end of the piling, the piles was gone. It has been thrown away, but very little left and rock has been scattered.

Q. What is left is piles of rock?

A. Mostly under water.

Q. What from your knowledge of the general conditions, what would be the danger in towing a vessel in from the—we will say, from No. 4 Buoy up to within a mile inside of the mouth of the jetty, on the day in question?

A. Well, from No. 4 Buoy, I could not see any danger at all. **[110]**

Q. What would be the danger generally at any time towing in? What would the danger consist of?

FULTON.—I object to that as not competent nor within the issues.

A. No. 4 Buoy is inside of the end of the jetty and I don't know that there is any danger at all.

Q. No. 4 Red Buoy, is that inside of the jetty?

A. Yes. No. 4 Buoy is way inside of the jetty. Almost in the bay.

Q. Then I wouldn't say that. From the first red buoy outside the mouth of the jetty, possibly the chart I saw didn't have the same numbers, the first little buoy outside the mouth of the jetty, what would be the danger of towing in?

FULTON.—I object to that as immaterial and not within the issues.

A. Under favorable weather conditions I don't see that there is any danger at all, but in very heavy

(Deposition of O. S. Wickland.)

seas, there would be danger of parting the hawser, and there would be danger of the towing vessel losing her propeller in the same manner as the "General Hubbard" lost hers.

Q. In case it would happen, then what would happen to the ship?

FULTON.—I object to that as incompetent and not within the issues.

A. They would have to depend on Divine Providence in a case of that kind.

Q. What would usually happen to the tow-boat or towing vessel by losing propeller?

A. Well, sir, the only way I could see, they would have to drop anchors and await aid from some other vessel.

Q. What danger would there be?

A. There would be danger of drifting, they would drift out as a general rule. It has happened, that they have lost their towing cable and drifted out over the bar, and drifted to either side, either to north or south and drifted into Peacock Spit, but as conditions were at that time, I don't know what the result might have been. [111]

Q. With a southwest squall blowing and a current such as it was at that time, if the hawser had parted or the tow vessel "Avalon" had lost her propeller, what, in your opinion, would have happened to one or either of the vessels?

FULTON.—I object to that as immaterial and incompetent.

A. I imagine that they would have to drop anchor

(Deposition of O. S. Wickland.)

and wait assistance from another vessel, if they had used proper seamanship both of them, so far as I am able to understand.

Q. Supposing anything happened so that they couldn't drop anchor. If conditions were such that they could not drop anchor?

FULTON.—I object to that as incompetent and immaterial and assuming what did not exist.

Q. I want to know what the danger consisted of, assuming that the tow hauser had parted and that the towing vessel had lost her *vessel,* what would the danger consist of under those conditions with a southwest squall blowing?

A. Well, I really don't know what to say, Mr. Spittle. I don't think there would be any particular danger. They could have dropped their anchors and waited assistance from another vessel. There are so many things that could have happened, I can't quite explain to you.

Q. Wouldn't there be danger of one or both vessels piling up on Peacock Spit?

A. Such a thing could have happened.

Q. They have piled up on such conditions?

A. No, not under those conditions. The "Rosecran" piled up there.

Q. Now, what is the velocity of the current at the stage of the tide and when there is such a freshet in the river as there was on the 25th of July, 1916?

FULTON.—I object to that as immaterial.

A. What were the conditions you say?

Q. What was the velocity?

(Deposition of O. S. Wickland.)

A. When we met the "General Hubbard" the velocity wasn't very great because she was making fair headway at that time. [112]

Q. You say when you met her she was inside the bar? She had crossed the bar? A. Yes.

Q. You couldn't see her when she was crossing in? A. Yes.

Q. Did you notice whether or not they were laboring at that time?

A. I have to try to explain that to you, Mr. Spittle. When we came alongside of the vessel she was not very far from No. 4 Buoy, that is considered one of the worst places in going out there under ordinary conditions, and she was not laboring heavier than when we went alongside and took a letter from the captain of the "General Hubbard," you may imagine how she labored. We went alongside with a power boat and they lowered the letter.

Q. How did they lower the letter?

A. Just lowered with a piece of iron attached to it and line.

Q. Now, when you first came in sight of them. Do you know which way the "Avalon" was headed, what direction, when you first came in sight of her?

A. She then seemed to be heading up towards the hills.

Q. Did you see them come over the bar before you met them? A. Yes.

Q. For how long a distance out?

A. We couldn't see while we were past Ft. Stevens; there was a while we couldn't see them on

(Deposition of O. S. Wickland.)

account of the jetty and jetty sands being between us.

Q. When you first saw them, how far away were they approximately?

A. When we were to the jetty sands, they were perhaps four miles away.

Q. In what direction then was the "Avalon" headed?

A. Well, I cannot remember any other way than heading in. I cannot remember whether she was heading any other way. I didn't pay any particular attention.

Q. Could you say whether she was headed northerly or southerly?

A. I think she was headed towards the north before she came over [113] the bar.

Q. Did you notice the "Hubbard" which way she was headed?

A. No, not particularly. When we came alongside she was steering behind the other one.

Q. Coming over the bar, how were they headed?

A. Coming over the bar, I suppose they were headed upstream.

Q. I mean, was the "Hubbard" headed the same way as the "Avalon"?

A. She must have been or the "Avalon" couldn't get her in.

Q. Did you notice at any time whether the "Avalon" was headed one way and the "Hubbard" was sheering another way?

A. Not any more than is customary for a loaded

(Deposition of O. S. Wickland.)

ship to always sheer a little to either side. That is natural for a loaded vessel to do. I didn't notice anything particularly, Mr. Spittle. I want to be frank and tell the truth.

Q. I will ask you if on that day the condition of the river was not in what is known by mariners on the Columbia River and bar as "all run out and no run in"?

A. No, it couldn't have been that way because it was flood when the vessels passed the station.

Q. But the station is how far inside?

A. About six or seven miles.

Q. I mean at the time they crossed the bar.

A. It was running out then some.

Q. You know how much water there was in the river above normal? A. I couldn't state, sir.

Q. Approximately how many feet?

A. In the channel?

Q. In the channel.

A. I couldn't state exactly, Mr. Spittle, but I think the Government engineer reported some thirty-five or more feet.

Q. Above normal?

A. No, I thought you meant depth.

Q. I meant amount of flood?

A. When she crossed the bar, it must have been just about low water. [114]

Q. Now, Mr. Fulton asked you about fishing boats. You say the fishing boats are about twenty-six to thirty feet long.

A. You know just about as much about the Colum-

(Deposition of O. S. Wickland.)

bia River fish boats as I do.

Q. What kind of sea boat are they?

A. They are considerable good sea boats.

Q. Fish boats will go out in practically any sea?

A. I should say not—God sakes, no. That is all right in the river, but not in the sea.

Q. If they were outside, they could stand practically any sea?

A. They stand a good sea, but not any sea, Mr. Spittle.

Q. Fishermen do go out with them in the summertime, outside the bar?

A. Yes, providing the bar is not breaking.

Q. During the last few years that has been regular custom for a number of the fishing boats to go outside the bar and troll? A. Yes.

Q. That was what you went out for? That is, look after them?

A. No, we didn't go to look after them. We just went out to see what was the matter with the "General Hubbard." We were requested by someone from the Hammond Lumber Company to go and see what was the matter with her. They knew there was something the matter or she would not come back.

Q. I think that is all.

(Mr. FULTON.)

Q. The south jetty does not extend to the bar?

A. Not exactly as the bar is now, Mr. Fulton.

Q. On this day in question you say there was a prevailing southwest wind?

A. As far as I am able to remember, yes.

(Deposition of O. S. Wickland.)

Q. What direction then would have been the ocean current?

A. From the fact that the wind was from the southerly or southwesterly direction, the ocean current must be going in the same direction. **[115]**

Q. Would the northerly set of the current in the ocean extend to the bar?

A. Yes, the ocean current is outside of the bar.

Q. Would there be a northerly set to the current in the bar as it was a northerly set to the current in the ocean?

A. It might; I couldn't tell as to that.

Q. Then if there being a northerly set to the current in the ocean with a southwest wind on this day, if any accident should have happened to the "Avalon" or "Hubbard" and neither of them happened to have an anchor, these vessels would have drifted northerly instead of southerly? A. Naturally.

Q. There were sea-going tugs at Astoria at this time?

A. I couldn't say exactly, but there must have been. As a general rule, they aways have a tug.

Q. What communication, if any, existed at that time between your station and Astoria?

A. There is a telephone service between the pilot office and the station.

Q. If any accident should have happened to either tug or the tow, you had direct communication with the pilot office at Astoria? A. Yes.

Q. What headway was the "Avalon" making when you first saw her—normal or otherwise?

(Deposition of O. S. Wickland.)

A. Well, I couldn't say as to that Mr. Fulton. She was making fairly good headway.

Q. After the "Avalon" crossed the bar, what would you say, headway being normal or otherwise?

A. I couldn't state what *there* speed would be.

Q. But she was doing well?

A. I couldn't say. I know when we went alongside we slowed down some, quite a bit, and our power boat makes, I presume, about seven or eight. [116]

Q. Did you observe any indication on the part of the "Hubbard" to drift or sheer out of the ordinary?

A. No, sir.

Q. That is all.

(Mr. SPITTLE.)

Q. How many sea-going tugs are there in Astoria?

FULTON.—You mean were there?

A. There are two connected with the port of Portland.

Q. You know how many were in commission at that time, do you? A. No, sir.

Q. Isn't it a fact that in the summer-time there is *one* one tug in service?

A. As a general rule, they keep two, having one generally kept down at the mouth of the river.

Q. Was there a tug at the mouth of the river?

A. I don't think there was at the mouth of the river. I don't remember. At least I didn't observe any.

Q. Now, under the conditions Mr. Fulton stated a moment ago, with a northerly set of the current, assuming that they were in such a condition that they

(Deposition of O. S. Wickland.)

would be drifting, would one or the other one pile up on North Beach or Peacock Spit?

A. It depends on where they were, Mr. Spittle. When I met the "Hubbard" and "Avalon," the ocean current had no effect on the river current.

Q. When they were crossing the bar?

A. If anything should happen, such a thing could have happened I suppose. But with a strong ebb tide as it was at that time, they would drift out clear of the bar. I would like to cite an incident. When the "China Junk" came in in tow of a steam schooner she parted her hawser inside the bar and the "China Junk" drifted out of the bar to the northerly end and they dropped anchor and the schooner went out and picked her up next day.

Q. What was the condition of the "China Junk"? [117]

A. She wasn't ruined. I wouldn't express my opinion even as to that.

That is all. [118]

United States of America,
District of Oregon.

I, Edw. C. Judd, Notary Public in and for the State of Oregon, being the party named in the stipulation hereunto attached, as officer to take deposition of O. B. Wickland, hereby certify that pursuant to the stipulation hereunto attached there appearing before me on this day, Tuesday, March 20th, 1917, at the hour of ten o'clock A. M. the libelants through their proctor, Frank Spittle, Esq., and the claimant and respondents through their proctor,

C. C. Fulton, Esq., and on said date and at said time being attended by the proctors aforesaid, the within named witness O. B. Wickland, whose true name is O. S. Wickland, being the identical person described in the stipulation as O. B. Wickland, was by me carefully examined, cautioned and sworn to testify to the truth, the whole truth and nothing but the truth, and the testimony by him given was by me reduced to writing; that said testimony was taken in shorthand in my presence and in the presence of the witness, and in the presence of said proctors, entered into an agreement hereunto attached, and said witness being unable to remain sufficient length of time to have testimony typewritten, it was stipulated that the same should be considered his testimony and evidence, as if personally signed, and consequently his name is not signed to such testimony, but that the foregoing is the truth, the correct testimony and evidence given by said witness, and the whole thereof. That I am not counsel or attorney to either of the parties, nor in any way interested in the event of the cause named in said caption.

IN TESTIMONY WHEREOF I have hereunto set my hand and notarial seal this 20th day of March, A. D. 1917.

[Seal] EDW. C. JUDD,
Notary Public for Oregon.

My commission expires March 1st, 1921.

[Endorsed]: Filed Mar. 26, 1917. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [119]

In the United States District Court for the Southern Division of the Northern District of California, First Division.

Before Hon. MAURICE T. DOOLING, Judge.

No. 16,075.

STEAMER AVALON COMPANY,

Libelant,

vs.

The American Steamer "GENERAL HUBBARD," etc.,

Respondent.

HUBBARD STEAMSHIP COMPANY, a Corporation,

Claimant.

No. 16,110.

J. L. CHRISTENSEN et al.,

Libelants,

vs.

HUBBARD STEAMSHIP COMPANY, a Corporation, et al.,

Respondents.

Testimony Taken in Open Court.

MONDAY, MARCH 26, 1917.

COUNSEL APPEARING:

For the Libelant: IRA S. LILLICK, Esq.

For the Respondent and Claimant: IRA A. CAMPBELL, Esq., and Messrs. McCUTCHEN, OLNEY & WILLARD.

The COURT.—Will the testimony in this case be transcribed?

Mr. LILLICK.—This case will not be referred, your Honor. It is a salvage case. I would like the testimony written up, and, no doubt, Mr. Campbell will want it, too.

The COURT.—The only question is whether I shall take notes of the testimony.

Mr. LILLICK.—Oh, no, your Honor. The testimony will be written up. There is but one case on the calendar, Steamer Avalon Company [120] vs. The American Steamer "General Hubbard"; there is, however, at issue and before the Court a suit by the master and the crew of the steamer "Avalon" vs. the Hubbard Steamship Company, and although I have not taken it up formally with Mr. Campbell, I have understood that someone has taken it up with your office, Mr. Campbell, and that it is agreeable to you that both cases be heard at the same time.

Mr. CAMPBELL.—Yes, they should be consolidated.

Mr. LILLICK.—Yes, the two cases can be consolidated.

The COURT.—Let that order be made.

Mr. LILLICK.—The case has arisen, if your Honor please, out of a situation where the steamer "Hubbard," between twelve and fourteen miles offshore, about opposite the Cape Meares lighthouse, broke her crank-shaft and was left without any means of propulsion, having no sails, having no wireless with which to call for help, and with a full cargo of lumber, the cargo consisting not only of an under

deck cargo but also a deck cargo, some sixteen feet high on her deck.

The testimony that we expect to put before your Honor will show that the vessel, after having broken her crank-shaft—the "General Hubbard," in calling for help sent up first some rocket signals and also played her searchlight in the sky, so that any vessel that might be near might come to her assistance.

The "Avalon" was proceeding up the coast, and on the inside, about four or five miles from shore. Seeing the rockets and the searchlight playing, the "Avalon" changed her course, she was light, proceeding north to Willapa harbor, and went to the assistance of the "Hubbard."

After arriving at the "Hubbard," she found her lying in the trough of the sea, unable to keep her head up either to the sea or the wind, although the wind was only practically a light [121] breeze.

The owners of the "Hubbard" and the cargo upon her claim that she was in no danger and that it was a towage service that was subsequently performed by the "Avalon" taking her in tow and proceeding to Astoria.

The "Avalon" came in sight of the rockets at about 12:20 in the morning of July 25, 1916; the tow was made up and the lines fast at about 2:30 in the morning. The "Avalon" then proceeded and towed her up to the mouth of the Columbia River, and when she arrived at the bar, in attempting to cross the bar into the Columbia River, found that the freshets caused by the melting snow in the mountains

had raised the river to a point some 22 feet above normal, and as one of the witnesses put it, it was all flow out and none in, in other words, there was no tide coming in. The "Avalon" had a good deal of difficulty in getting the "Hubbard" in and over the bar; that as one of the witnesses put it, it took half an hour, I believe, to make a mile. Subsequently, the captain of the steamer "Hubbard" drew up an agreement in which he named the service performed by the "Avalon" as a towage service. It is the contention of the defense here that it was only a tow and not a salvage service.

I desire, before putting in any evidence, to obtain the permission of the Court to amend both of the libels. I am representing not only the Steamer Avalon Company, but the master and the crew of the "Avalon," and incidentally I might mention that it is the contention of the owners of the "Hubbard" and her cargo that the master and the crew of the steamer "Avalon" have assigned their interests in this salvage to the owners of the steamer "Avalon." Exceptions were argued before your Honor on some interrogatories attached to the answer of the Hubbard Steamship Company, and the libel filed by the master and the crew of the [122] steamer "Avalon," asking that we be required to state to respondents whether or not the master and the crew had assigned their interests to the owners of the "Avalon." The exceptions were overruled, with the exception of one of the interrogatoris, which interrogatory the respondents asked—

The COURT.—What you were going to get for it.

Mr. LILLICK.—Yes, your Honor, what we were going to get for it. I see that your Honor has a very good memory. Your Honor sustained that. There is, however, in the testimony of the captain of the "Hubbard" a statement that the crew were paid one-half a month's salary for that salvage. I think I had better take this point up now before proceeding with the case, because it will save difficulty hereafter in the testimony.

I know your Honor will pardon my statement that I think your Honor was in error in not having overruled the objections, but I think that was due, perhaps, to the manner in which it was presented to your Honor. As a matter of fact, it makes no difference whether the owners of the "Avalon" entered into any agreement with the master and the crew of the "Avalon" under which agreement the master and the crew assigned over to the "Avalon" their interest in the salvage, because such an agreement is invalid, it is not good. We are not concerned here with how much, if anything, the owners of the "Avalon" paid the master and the crew for that service. I am here representing the owners of the "Avalon," and I am also here representing the crew, and under a situation where, when this case first started, the owners of the "Avalon" obtained from the master and the crew an agreement under which—and, by the way, that is attached to the answers to the interrogatories which your Honor required us to file—I say, the master and the crew of the steamer "Avalon" agreed to do everything they could to aid and abet us in obtaining as high a salvage award as pos-

sible. [123] If your Honor cares for the citation of any authorities upon it, I don't know how far this is going to go from the standpoint of the other side, apparently the suggestion was made in good faith to the Court that an agreement was made between the owners of the "Avalon" and the master and the crew under which, for one-half a month's salary, one-half a month's wages, the master and the crew of the steamer "Avalon" assigned their interests to the owners of the "Avalon." Neither the "General Hubbard" or her owners, nor the owners of the cargo, have anything whatever to do with that. That is a situation in which the master and the crew of the "Avalon" are involved, upon the one side, and the owners of the "Avalon" are involved upon the other. They have an agreement, which agreement is attached to the interrogatories, under which, after this case is ended, after this Court has made an award, or as was contemplated then, the owners of the "Hubbard" and the owners of the "Avalon" had agreed upon a sum to be paid to the "Avalon" for her service, the crew and the owners of the "Avalon" should attempt to arrange amicably between them the amount that should be paid to the crew, or, if unable so to agree, that the master and the crew should have the right to employ independent counsel. That situation is still in effect. However, as I said in prefacing this, it is not for the owners of the "General Hubbard," or the owners of the cargo on the "General Hubbard," to take exception to anything that has been done. An agreement, if such agreement has been made, in which a part of the

compensation which the Avalon Company expected to receive and will receive from the "Hubbard" and her cargo for this service is or already has been paid to the master and the crew, that does not entitle the Steamer Avalon Company to rest upon that; the crew and the master have a right to disregard the [124] amount that has been paid them, if anything, and collect from the Steamer Avalon Company whatever the Court will award to them. And I ask the Court, in carrying this case on to a conclusion, and when deliberating upon the testimony in the case, to make a separate award, not only specifying the master and the crew of the steamer "Avalon" with the proportion as will be ultimately determined from the wages paid to them that is due to them for their part in this salvage, and a separate award for the Steamer Avalon Company.

I desire to ask permission of the Court to file an amendment to both libels, in which the values of the two vessels are changed and in which also the freight on the cargo of the "Hubbard" may be asked to participate in the salvage. That amounts to, I think, so far as the freight is concerned, but very little. With the Court's permission I will file these two amendments.

Mr. CAMPBELL.—We do not consent to the making of the amendments.

The COURT.—Are those just as to values?

Mr. LILLICK.—Not only the values, but also the freight. I have asked to amend paragraph 9 of the libel by inserting the words "and freight" after the word "cargo" on line 5, page 4 of said libel. The salvage award would have, as a part of it, a propor-

tion of the value of the freight, so far as that freight was earned upon the voyage that the "Hubbard" commenced from the Columbia River down to the point where she became disabled; I don't know what that would amount to; it would amount to but very little. It does not put the defense here in a situation where they are taken by surprise. I didn't know this, Mr. Campbell, when I telephoned to you on Saturday, it was another afterthought.

Mr. CAMPBELL.—I simply am not consenting to the amendment. I presume probably the Court will allow the amendment. I do not want [125] to be in the position of consenting to the amendment as to these values. I think the Circuit Court of Appeals of this circuit,—either a case from this district, or from Oregon, or from Washington, held in a salvage case, the Pacific Coast Steamship Company vs. Perry, where a British sailing vessel by the name of "Nelson" went out of the Columbia River and became disabled offshore and was subsequently towed by one of the Pacific Coast vessels, either back into the Columbia River or to Puget Sound, the Court held there that there had been no freight earned on that voyage, because the voyage had practically just commenced. I think that the element of freight was not taken into consideration in allowing the salvage.

Mr. LILLICK.—Well, then, from Mr. Campbell's statement just made, your Honor, it is a question of law.

The COURT.—The amendment will be permitted.

Mr. CAMPBELL.—May the record show that we have denied the allegations of the amendment?

The COURT.—Yes.

Testimony of W. S. Burnett, for Libelant.

W. S. BURNETT, called for the libelant, sworn.

Mr. LILLICK.—Q. What is your connection with the Hubbard Steamship Company, the respondent?

A. At the time in question and since then, I have been merely a director of the Hubbard Steamship Company, and its general counsel.

Q. And your connection with the Hammond Lumber Company at the time the salvage service was performed was what?

A. I was vice-president of the Hammond Lumber Company, a New Jersey corporation.

Q. As a director of the Hubbard Steamship Company, and not as its [126] attorney, Mr. Burnett, were not negotiations pending for the sale of the steamer "General Hubbard" upon July 25, 1916, when this salvage service was performed?

A. Certainly no negotiations were pending which ultimately resulted in her sale. There may have been negotiations at that time, as you know the market was one of intense excitement about that time, both prior and afterwards.

Q. The steamer was, however, sold within a short time after that, wasn't she?

A. She was finally sold; I think it was in October that the title passed, as I recall.

Q. In October? A. Yes.

Q. Who were the purchasers, Mr. Burnett?

A. They were Norwegian parties; I think the name of Kjeld-Stub was the name of the purchaser appearing in the bill of sale.

(Testimony of W. S. Burnett.)

Q. When did the title pass?

A. At that time.

Q. In October.

A. About in October; I could not tell you exactly without looking at my file.

Q. Was it in the commencement of October, or in the latter part of October?

A. I cannot recall, but there is information from which I can refresh my memory. If I can suggest to you, Mr. Lillick, if you will pardon me for doing so, Mr. Stewart has these matters all in mind much better than I have, and I think myself you would rather have his testimony than mine.

Q. Thank you for the suggestion, Mr. Burnett. That is all.

Mr. CAMPBELL.—No questions.

Testimony of L. C. Stewart, for Libelant.

L. C. STEWART, called for the libelant, sworn.

Mr. LILLICK.—Q. Mr. Stewart, what is your connection with the Hubbard Steamship Company?

A. Vice-president. [127]

Q. Were you vice-president in July, 1916?

A. Yes, sir.

Q. What negotiations, if any, were pending for the sale of the steamer "General Hubbard" in July, 1916?

A. The market at that time was very active; I don't know of any definite negotiations.

Q. You had offers for her, did you not, in the month of July, 1916?

(Testimony of L. C. Stewart.)

A. We had offers about that time; yes.

Q. What were those offers?

A. One was $375,000 for delivery of the vessel in the Atlantic Ocean, on the Atlantic seaboard.

Q. And another was what?

A. In the Atlantic.

Q. And another?

A. That is about all I can recall.

Q. When did your negotiations commence with the Norwegian firm that subsequently purchased the "General Hubbard"?

A. On August 28th, 1916.

Q. She was subsequently sold to this Norwegian firm? A. Yes, sir.

Q. And at what figure?

Mr. CAMPBELL.—For the purpose of the record, we object to this as being immaterial.

The COURT.—The objection is overruled.

A. $463,125.

Mr. LILLICK.—Q. In cash, or on terms?

A. In cash.

Q. $463,125 in cash? A. Yes, sir.

Q. Mr. Stewart, you are acquainted with the prevailing rates for carriage of lumber on this coast, are you not? A. Yes, sir.

Q. And you were acquainted with the prevailing rates in July, 1916? A. Yes, sir.

Q. The "General Hubbard" was intended, primarily, as a lumber carrier, was she not?

A. Yes, sir, she was built for that trade.

Q. What was the prevailing charter rate per

(Testimony of L. C. Stewart.)

thousand for lumber from the Columbia River to San Francisco in July, 1916?

A. We were carrying lumber largely to the San Pedro market. [128]

Q. What were the prevailing rates to San Pedro from the Columbia River?

A. We allowed the "General Hubbard" $6 a thousand on the voyage on which the accident took place.

Q. That was $1 below the prevailing rate, was it not?

A. That was the rate she was committed on.

Q. Mr. Stewart, was not that $1 below the prevailing rates at that time? A. Yes.

Q. Is it not the fact that the prevailing rate for the carriage of lumber from the Columbia River to San Pedro in July, 1916, was $7 a thousand?

A. Yes, sir.

Q. And is it not also a fact that the prevailing rate for carrying lumber from the Columbia River to San Pedro in August, September and October, 1916, was $7 a thousand? A. Yes, sir.

Q. When was the "General Hubbard" built?

A. She went into commission in January, 1911.

Q. How much lumber did she have upon her when she started upon this trip from the Columbia River in July, 1916? A. 1,646,910 feet.

Q. How long did it usually take the "General Hubbard" to make the voyage from the starting point from which she commenced the voyage in July, 1916, in which this salvage charge was ren-

(Testimony of L. C. Stewart.)

dered, to San Pedro? A. 4½ days.

Q. How long had she been out from port when her crank shaft broke?

Mr. CAMPBELL.—He was not there, Mr. Lillick, but that is already proved in the record.

A. Twelve hours.

Mr. LILLICK.—Then it may be admitted, Mr. Campbell, how far she had proceeded on her voyage.

Mr. CAMPBELL.—It won't be admitted. I say you have already proved it by your log-book.

Mr. LILLICK.—Q. Do you know where she was picked up?

A. I know from the affidavits of the master and the crew where she was. [129]

Mr. LILLICK.—And those are correct, are they, Mr. Campbell?

Mr. CAMPBELL.—I don't know. I have not seen them. I don't know that there is any dispute about that. It was 14 miles, practically, northwest of Cape Meares. That already has been proved by your depositions and our depositions.

Mr. LILLICK.—Then we could have saved time if we had the admission at once.

The COURT.—He said she was twelve hours out.

Mr. LILLICK.—That is all.

Cross-examination.

Mr. CAMPBELL.—Q. In allowing the "General Hubbard" a $6 freight rate as against a $7 going freight rate, was she given any preferential treatment in dispatch—loading and unloading?

A. Yes, sir; we give our boats always a prefer-

(Testimony of L. C. Stewart.)

ence of 50 cents because of dispatch. The rate of freight advance early in June from $6.50 to $7. The "General Hubbard" was committed on a voyage at $6.

Q. What do you mean by that—already chartered ahead? A. Yes, practically.

Q. Had her lumber been sold ahead of time based upon a $6 freight rate?

A. Yes, and the lumber was awaiting the arrival of the vessel.

Q. What knowledge have you of any changes that were taking place in the months of August, September and October in vessel values on this coast? In other words, let me put the question this way: I don't know whether you have knowledge of this, or not, but can you say that an offer or a value that might be placed upon a vessel on the 15th day of August, 1916, was any criterion as to what she might have brought on the first day of September?

Mr. LILLICK.—I object to that as leading. **[130]**

Mr. CAMPBELL.—Yes, I appreciate that.

Q. Have you any knowledge upon the question of the variation in values that was taking place at that time?

A. I have the knowledge only gained through association with shipping people.

Q. Did you sell some of your steamers during the fall of that year? A. Yes, sir.

Q. What one, for instance?

A. The steamer "Edgar H. Vance."

(Testimony of L. C. Stewart.)

Q. Do you know whether she was resold within a short period of time after you sold her?

Mr. LILLICK.—We object to that as irrelevant, immaterial and incompetent. We are not concerned with how often any other vessel was sold. There is no comparison between the two vessels.

Mr. CAMPBELL.—I think it is material in this way, it will show to the Court that there was such a rapid movement in the market for vessels, at that time that—

The COURT.—I suppose that is true. It is not one of those things that the Court takes judicial notice of, but I know everybody knows it to be a fact that values were rapidly advancing at that time.

Mr. CAMPBELL.—Yes. I was trying to get before the Court, if I could, a concrete case, other than this one, to show just how rapidly they did advance.

The COURT.—The objection is overruled.

Mr. CAMPBELL.—Q. Do you know of the resale of the "Vance" after she had been sold by you?

A. Only by hearsay.

Mr. CAMPBELL.—Well, that is all. I am going to call other witnesses on that point.

Redirect Examination.

Mr. LILLICK.—Q. You spoke, Mr. Stewart, of the charter rate [131] on the "General Hubbard." She was chartered to one of your own companies, was she not? A. Yes.

Q. In other words, it was a working arrangement in the office? A. Yes.

(Testimony of L. C. Stewart.)

Mr. CAMPBELL.—Q. You run your departments separately, as though they were separate businesses entirely, do you not? A. Yes.

Mr. LILLICK.—Q. Mr. Stewart, what was the value of the cargo of lumber upon the "Hubbard," which comprised the 1,646,910 feet?

A. The value at what point, Mr. Lillick?

Q. The value at her port of delivery in the south, San Pedro.

Mr. CAMPBELL.—We object to this as immaterial.

The COURT.—Let us get it at both ends.

A. The mill value was $15,801.21; the freight was $9,881.46.

Mr. LILLICK.—Q. And the value at San Pedro?

A. It would be a total of those two.

Q. Was that for what you sold the lumber at San Pedro? A. Yes, sir.

Mr. CAMPBELL.—Q. After this accident, was there any appraiser of the vessel's value employed to appraise the value of the "General Hubbard" as between the various interests of cargo and the ship and the insurers of the cargo and the insurers of the ship? A. Yes, sir.

Q. Who was that?

A. Captain Pillsbury.

Q. And this figure you speak of as the value at the mill, at what point is that?

A. At Astoria, Oregon. [132]

Testimony of R. A. Hiscox, for Libelant.

R. A. HISCOX, called for the libelant, sworn.

Mr. LILLICK.—Q. What is your connection with the Steamer Avalon Company?

A. I am secretary.

Q. Were you secretary of the company in July, 1916? A. Yes, sir.

Q. How long have you been connected with the company? A. Ever since it was formed.

Q. Was it formed about the time that the steamer "Avalon" was built?

A. Yes, sir; at the time she was completed.

Q. When was she completed, or about when, approximately? A. 1912, as I remember it.

Q. Do you remember her cost at that time?

A. Her cost was $125,000.

Q. During the year 1916 was the Steamer Avalon Company at any time offered a price for the steamer "Avalon"?

Mr. CAMPBELL.—We object to that as immaterial, irrelevant and incompetent, for the reason that the president of the Steamer Avalon Company, Mr. W. H. Wood, who does not seem to be in court, has already sworn in his libel to a value of $125,000 of the "Avalon."

Mr. LILLICK.—If your Honor please, at the time this libel was drawn—

The COURT.—The objection is overruled.

A. I do not know that I can say that we were definitely offered a price. During the year 1916 there were brokers from time to time who would call

(Testimony of R. A. Hiscox.)

up us and ask us whther we would consider a sale of the vessel at some stated price.

Mr. LILLICK.—Q. What were those stated prices? A. From $200,000 to $225,000.

Q. During the course of your business, and connected with the Avalon Steamship Company, as you have been during this time, [133] do you know of the values of vessels of similar types to that of the "Avalon" and sold in the market of San Francisco in 1916? A. Approximately; yes, sir.

Q. What, in your opinion, was the market value of the steamer "Avalon" in July, 1916?

A. I would say about $200,000.

Cross-examination.

Mr. CAMPBELL. — Q. Market values were changing very rapidly during the latter part of 1916, for vessels of this type?

A. Yes, during the entire year of 1916.

Q. But they did not become active until the fall of the year, did they?

A. They became quite active along in June. Freight rates increased very rapidly during the first half of 1916, and reached their maximum in June, and have been maintained at about that same rate ever since.

Q. When were these offers that you received during the year 1916, do you recall?

A. Not definitely. We were offered, from time to time during the entire year, we were asked whether we would consider offers on our vessels, but we were not in a position to sell them.

(Testimony of R. A. Hiscox.)

Q. Mr. W. H. Wood is the president of your company, is he not? A. Yes, sir.

Q. He is also president of the Hart-Wood Lumber Company? A. Yes, sir.

Q. And this vessel is used almost entirely in carrying lumber for the Hart-Wood Lumber Company?

A. Yes, lumber that we sell.

Q. But carrying lumber under charter, or for the account of the Hart-Wood Lumber Company?

A. Yes, sir.

Q. And this vessel, I suppose, is owned on shares, in which there are other people interested?

A. That is correct. [134]

Q. The vessel was built under the supervision of the officials of the Hart-Wood Lumber Company?

A. Yes, sir.

Q. It was one of your promotion, was it not?

A. That is correct.

Q. And Mr. W. H. Wood was actively in charge of the management of this company in July, 1916, was he not? A. Yes, sir.

Q. There is no officer of either the Hart-Wood Lumber Company or the Avalon Steamship Company who was better informed as to the steamer "Avalon" and her value than Mr. Wood was?

A. No, I think not.

Mr. LILLICK.—If your Honor please, in certain portions of the testimony witnesses for both parties in this case have testified as to the course pursued by the captain of the "Avalon" in bringing the vessel into Astoria and reference has on several different

(Testimony of R. A. Hiscox.)

occasions been made to a red buoy as well as to a row of black buoys. For the purpose only of identifying that part of the channel at the mouth of the Columbia River, I offer this chart in evidence, it being a Government chart, and ask that it be marked Libelant's Exhibit No. 1.

Mr. CAMPBELL.—I have no objection to the chart so far as it may speak correctly, but until you have some evidence before the Court that buoy No. 4 on that chart is in the same position as buoy No. 4 was at the time of this accident the chart of course is valueless; I happen to know that those buoys are changed upon the Columbia River, and that at this time they were working with a dredger up there, the "Chinook" changing the configuration of the channel entirely.

Mr. LILLICK.—A map made prior to the time the one I am offering has the same row of buoys. I am not aware that they have been changed. Are you sure of that, Mr. Campbell?

Mr. CAMPBELL.—No, I am not. Just let me look at that [135] other chart. No. 4 buoy on one chart is twice the distance off the end of the jetty as the No. 4 buoy is on the other. That chart shows the projection of the north jetty. They are continually working on the extension of that north jetty. I know they had a dredger up there, the "Chinook" working on the extention of that jetty and that as that work progressed they changed the location of the buoys; I cannot say whether that is correct, or not.

Mr. LILLICK.—Then for the purpose of giving

(Testimony of R. A. Hiscox.)

to the Court a general idea of the mouth of the Columbia River—and I shall be very glad to have Mr. Campbell put in a chart, if he has one, showing that point—I desire to offer this chart in evidence and ask that it be marked Libelant's Exhibit 1.

(The chart was here marked Libelant's Exhibit 1.)

We offer in evidence the depositions of Jens L. Christensen and Peter Rodland, taken on Monday, October 16, 1916. I take it that your Honor would rather read these over later; that is, there is no use of taking the time to read them now.

The COURT.—Oh, yes. Nothing will be gained by reading them now. I will have to read them myself.

Mr. CAMPBELL.—We took the deposition of the captain of the life saving station at the mouth of the Columbia River. That chart shows buoy No. 4 is outside the end of the jetty and yet he says in the course of his deposition that buoy No. 4 is inside the mouth of the jetty. You cannot bank upon the accuracy of those buoys.

Mr. LILLICK.—I don't want the Court to understand that I am saying so. This is simply for a general idea of the situation there. I want to make myself clear on that.

The COURT.—I understand the situation. [136]

Testimony of Fred D. Parr, for Libelant.

FRED D. PARR, called for the libelant, sworn.

Mr. LILLICK.—Q. Mr. Parr, what is your business? A. Steamship business.

Q. How long have you been in the steamship business? A. Thirteen years.

Q. Mr. Parr, have you a general knowledge of the situation with reference to the prices obtained for steam schooners in the port of San Francisco during the year 1916? A. Yes, sir.

Q. Can you give us an example of a sale of a vessel somewhat similar to the "Avalon," if you know her, during 1916?

A. The steamers "Rosalie Mahony" and "Mary Olsen" were sold during 1916 for $160,000 each.

Q. How did they compare in size with the "Avalon"?

A. About the same, although they were not in as good condition as the "Avalon" on account of having been carrying mahogany logs on the Atlantic side.

Q. When were those sales made?

A. About the middle of 1916.

Q. Do you know what month?

A. I have not the exact date, no.

Q. You know the steamer "Avalon"?

A. Yes, sir.

Q. What, in your opinion, was the market value of the steamer "Avalon" in San Francisco in July, 1916? A. $175,000.

Q. Do you know the steamer "O. M. Clark"?

A. Yes, sir.

(Testimony of Fred D. Parr.)

Q. Was she sold in 1916? A. No, sir.

Q. Do you know the steamer "San Ramon"?

A. Yes, sir.

Q. Do you know when she was built in 1913.

Q. How did she compare in size with the "Avalon"?

A. A little smaller in carrying capacity but of better construction in my judgment than the "Avalon."

Q. Was she sold in 1916? A. Yes, sir.

Q. For what price? A. For $250,000. [137]

Cross-examination.

Mr. CAMPBELL.—Q. The "San Ramon" you say was a better constructed vessel than the "Avalon"? A. Yes, sir.

Q. She was sold in the Atlantic? A. Yes, sir.

Q. And she was sold on such terms that the purchaser was able to pay for her out of her earnings, was she not? A. Yes, sir.

Q. Sold for a dollar down and a dollar a month forever, to be earned out of the operations of the vessel?

A. It was $100,000 down and $5,000 a month with the understanding that they should pay us the balance if they would get a 5% discount.

Q. They offered to pay the price on a 10% discount but they would not sell it: isn't that a fact?

Mr. LILLICK.—That is objected to as not cross-examination and as immaterial.

A. We offered them a discount of 2 or 3%. When I saw them down in New Orleans on this trip they said they thought they were entitled to a 5% discount

(Testimony of Fred D. Parr.)

and I told them I could not give it.

Q. In the agreement of sale there was nothing said about a 5% discount, was there?

A. Nothing at all.

Q. And at the time you sold the vessel you knew that you were selling her on such terms that these people could pay for her out of the earnings of the vessel? A. Yes, sir.

Q. You said that the "Rosalie Mahony" is a younger vessel than the "Avalon"?

A. I think she is one year younger.

Q. And the "Mary Olsen" was not as old as the "Avalon"? A. One year younger.

Q. They were sold in the Gulf of Mexico, were they not? A. Yes, sir.

Q. And the prices that were obtained for those vessels were the highest prices which were obtained for any vessel of the steam schooner class?

A. They were just at that time, yet they were [138] not considered a very good sale as things went.

Q. But there was a specially limited market in the Gulf of Mexico for that type of vessels?

A. They have been buying them ever since.

Q. Was not the market limited?

A. They had bought about 10 vessels down there of the steam-schooner type.

Q. But that was a market which was limited by the demands or the needs of the so-called mahogany trade on the west coast of Central America?

A. Partially that and carrying lumber down to the

(Testimony of Fred D. Parr.)

West Indian ports and over to Trinidad and bringing sugar back.

Q. You said that the "Rosalie Mahony" and the "Mary Olsen" were not in good condition; you didn't consider either one of those vessels, did you?

A. That is the statement of Mr. Olsen, the owner.

Q. But you yourself have no knowledge of their condition?

A. No, sir, not other than his statement.

Q. Do you wish to say now on the witness-stand in court that the placing of these vessels in the mahogany trade worked to the detriment of the vessel?

A. There is a difference of opinion on that. Mr. Olsen says that it does, from his experience with those two vessels.

Q. But there is a difference of opinion, isn't there?

A. Yes.

Q. Many men engaged in that business contend that the mahogany trade does no more harm to a vessel than the ordinary lumber trade on this coast?

A. That is correct.

Q. No sales have been made of the wooden type of vessels anywhere near the price of the "San Ramon"?

A. Except that I offered $200,000 for the "O. M. Clark" last week, and they would not accept it, less 55.

Q. Last week? A. Yes, sir.

Q. Values have been going up very rapidly since the 1st of September, 1915, haven't they?

A. I don't know that the values [139] have

(Testimony of Fred D. Parr.)

been going up; there has been stiffening owing to the turning over of vessels.

Q. By stiffening you mean that the prices are increasing?

A. The supply has been lessened very greatly. The values have not been going up very much.

The COURT.—At least the offers are being raised.

Mr. CAMPBELL.—I think that is all.

Redirect Examination.

Mr. LILLICK.—Q. The "Rosalie Mahony" and the "Mary Olsen" were vessels that were sold by two partners, were they not, at a time when the partners had had some difficulty? A. Yes.

Mr. CAMPBELL.—Excuse me a moment. Are you testifying or is the witness testifying?

Mr. LILLICK.—Mr. Campbell, if you desire to make an objection to my question on the ground that it is leading you can do so.

Mr. CAMPBELL.—I do then.

The COURT.—The objection is sustained.

Mr. LILLICK.—Q. What was the situation with reference to the sale of the two vessels that you said were sold for $160,000 with reference to their ownership?

A. Those were among the first sales made on the Atlantic side of steam-schooners and they were very anxious to clean up and that is why they accepted the price they did.

Mr. CAMPBELL.—I move to strike out the statement that they were very anxious to clean up, and so forth, on the ground that that is a conclusion of the

(Testimony of Fred D. Parr.)

witness and not a subject of expert testimony.

The COURT.—Let that go out.

Mr. LILLICK.—Q. Do you know that from the gentlemen involved, Mr. Olsen and Mr. Mahony? [140]

Mr. CAMPBELL.—That is objected to as hearsay.

The COURT.—Yes, that is hearsay.

Mr. LILLICK.—Q. Those two vessels had no passenger accommodations, had they? A. No, sir.

Q. The "Avalon" had passenger accommodations?

A. Yes.

Q. That also makes a difference in the price of those vessels, does it not?

A. It is usually figured that passenger accommodations, together with the equipment, cost about $10,000 on the average steam-schooner.

Q. The statement that you made upon cross-examination with reference to values, is that based upon any change with reference to freight rates on lumber from the Columbia River to San Pedro and the Columbia River to San Francisco?

A. The rates are about the same and have been for the past nine or ten months.

Q. So that the freight rates were the same in June, 1916, as they are to-day? A. Coastwise, yes.

Q. I think you said that the "Mary Olsen" and the "Rosalie Mahony" were not considered very good sales: what did you mean by that?

A. They figured that more money could be obtained for the vessels at the time they were sold.

(Testimony of Fred D. Parr.)

Q. So that $160,000 was not the price that they might have obtained?

A. In the judgment of those who were dealing in steam schooners.

Mr. CAMPBELL.—Q. You had nothing to do with the sales of the vessels at all? A. No, sir.

Q. All you knew about that is what somebody had told you? A. That is right.

Mr. LILLICK.—That is our case, your Honor. [141]

Testimony of R. A. Hiscox, for Respondent.

R. A. HISCOX, called for the respondent.

Mr. CAMPBELL.—Q. Have you any personal knowledge of the transaction that was entered into between the Steamer Avalon Company and the master and the crew of the "Avalon" by which the Avalon Company purchased whatever claim the crew might have for compensation for salvage in this case?

Mr. LILLICK.—Objected to, if your Honor please, upon the ground that it is immaterial, irrelevant and incompetent. I said that I deemed that the ruling made already in this case with reference to that was in my opinion an error, with all due respect to the Court, and I think it will only take a moment's argument, perhaps only a statement of the situation—

The COURT.—Will it take any longer than it would to take the testimony?

Mr. LILLICK.—Yes, for this reason, your Honor,

(Testimony of R. A. Hiscox.)

that counsel on the other side is going into this matter apparently with the desire of impressing the Court with a situation which the Court ought not to take into consideration at all.

The COURT.—If the Court should not it won't. I would rather have the testimony and determine later whether it should be considered, or not, rather than find out later that it should have been taken and not have the testimony before me.

Mr. LILLICK.—I would like to make the statement, if your Honor will permit me to do so. I believe it my duty to do so. The owners of vessels have no right to trade with the master or the crew with reference to their wages in any different sense than an outsider. The law specifically prohibits a sailor from assigning his wages. Cases, without any criticism after the decisions have been rendered, in courts entitling, I think, this Court to take them into consideration in passing upon the question, [142] and the rule apparently has never been questioned, that in salvage cases—and I have a case absolutely squarely in point, if the owners of the steamer buy from the crew their claim to salvage, and have an assignment made from them, the Court disregards it. The crew are in exactly the same situation whether the owner has bought from them or whether he has not. We are before the Court here to-day in exactly that situation. It is the apparent attempt of the respondent in this case to have brought to the Court's attention an agreement made with these sailors for the purpose of having this court find—I am infer-

(Testimony of R. A. Hiscox.)

ring this—that no amount paid to those sailors by the owners of this steamer should be taken into consideration by the Court in fixing the amount of salvage to be awarded to those sailors—

The COURT.—Oh, no, nothing of that kind. The only effect it would have on the Court, would be to see whether the other fellow is entitled to sue, or not. They could not both sue if it was a valid assignment.

Mr. LILLICK.—Both of them have not sued. When this libel was drawn I was in New York. It was drawn in my office during my absence. The original libel is a libel against the Hammond Lumber Company and the steamer "General Hubbard." It was drawn for the Avalon Company against the steamer "Hubbard," not on behalf of the master and the crew but on behalf of the Steamer Avalon Company and no one else. It did not have in it the language, on behalf of the master and the crew. There was nothing in that libel that would have entitled the Steamer Avalon Company to recover any amount from the owners of the cargo and the owners of the steamer "General Hubbard" to give to the crew. There was at that time however an agreement between the owners of the steamer "Avalon" and the master and the crew that the owners of the "Avalon" should pursue the right of action of the master and the [143] crew against the "Hubbard" and against her cargo, and then enter into an agreement between each other subsequently that the amount should be amicably adjusted between them, or if not amicably adjusted then that the master and the crew should

(Testimony of R. A. Hiscox.)

have the right of consulting independent counsel. That agreement is attached to the answer to the interrogatories. Now, the situation here is that the owners of the "Hubbard" are attempting to cut down—your Honor said a moment ago it would not be considered so we will drop that from the discussion. We are in a situation here with pleadings and with testimony that entitle me, and I do most seriously and earnestly ask the Court for an award for those sailors and an award for the Steamer Avalon Company. It is for the sailors hereafter, if they cannot agree upon what they have done with the owners of the steamer "Avalon," to ask and receive the amount of salvage that this Court awards them. And inasmuch as I represent both parties I want to state to the Court and I want to state to counsel on the other side that whatever award is made by this Court to the crew of this vessel is going to be paid to the crew of that vessel, and I am going to see that it is because I am in a situation where otherwise it would be not only taking advantage of the Court but taking advantage of the situation. Counsel upon the other side has brought this matter up perhaps feeling that the way in which it was brought to his attention ought to have the matter brought before the Court in such a way that his client should be entitled to any saving made by my client. My client is not going to make such a saving and whatever award is made here is going to be paid to this crew. The parties to this action contemplated a settlement at one time, and there was the kindliest feeling between the

(Testimony of R. A. Hiscox.)

owners of the steamer "Avalon" and the Hammond Lumber Company and the Hubbard Steamship Company. In all seriousness I ask this Court to award the crew a [144] definite amount, and that amount is going to be paid to the crew, and I pledge my connection with the case that it is going to be paid to the crew notwithstanding whatever arrangement may have been made already. In a similar case where owners of a steamer had performed salvage service and had obtained from the crew an assignment for a much less amount than was allowed the crew the Court held that the owners of the steamer involved could collect, and as I remember the language, it would be credited with the amount that they had already paid the crew. But I do say to the Court and to counsel that whatever award is made in this case to the crew of the steamer "Avalon" is going to be paid to that crew and we are going to credit on that amount whatever amount has been already paid. My position here before the Court is such that I think it proper that I should pledge my connection with this Court that that be done. Now, that is the situation and we seriously object to the attempt to put before the Court any question with reference to this assignment at all. I think Mr. Campbell will agree with me that it is the law, and there can be no question about it, that the rights of the members of the crew in a salvage case cannot be assigned, and that any assignment made by them is invalid. Is not that the law, Mr. Campbell?

Mr. CAMPBELL.—I don't know.

(Testimony of R. A. Hiscox.)

Mr. LILLICK.—Well, it is the law, if your Honor please, and I can cite authorities to that effect.

Mr. CAMPBELL.—I have heard Mr. Wall urge before this Court that the master of a vessel could not make an arrangement at sea with the master of another vessel by which the crew can be cut off from their rights.

The COURT.—Well, I am not like Judge Wallace; he said he would rather hear the argument on a motion for a new trial; I [145] would rather hear it upon the submission of the case. The testimony will be taken.

Mr. CAMPBELL.—All I want is simply a frank disclosure of what the situation was.

Mr. LILLICK.—I will make the disclosure, if your Honor please. I can give it to you Mr. Campbell, in just one minute.

Mr. CAMPBELL.—Maybe you can assist us then so as to save time. I don't think you have made a complete disclosure of the facts in the answer to the interrogatory.

Mr. LILLICK.—Now, that is not an attempt to say that I personally did not state to the Court what the situation was?

Mr. CAMPBELL.—Not at all.

Mr. LILLICK.—Now, if your Honor please, you this morning stated you sustained an interrogatory, that they did not have a right to know what had been paid—

The COURT.—I had in mind the proposition that if a valid assignment had been made only one party

(Testimony of R. A. Hiscox.)

could sue, the assignee, and that the respondent could not be subjected to two different actions.

Mr. LILLICK.—If your Honor please, they have not been subjected to two different actions.

The COURT.—Well, we have passed that point; you had better proceed.

Mr. LILLICK.—All right, your Honor. The fact is this: when the vessel arrived in San Francisco, the members of the crew I think were on the way down to San Pedro; will you correct me, Mr. Campbell and Mr. Burnett?

Mr. CAMPBELL.—I don't know about it, Mr. Lillick. I know you paid your people so much. Mr. Hiscox probably handled this.

Mr. LILLICK.—Q. Did you handle this, Mr. Hiscox?

A. No, sir. Mr. Wood went south and handled the transaction. [146]

Mr. LILLICK.—You do know, Mr. Campbell, that the steamer came in and that Mr. Wood and the Hammond Lumber Company were very friendly, they believed they were going to settle this case without litigation; that is a fact, is it not?

Mr. CAMPBELL.—I don't know. I don't know what they believed. I know what they tried to do. I know that your people wanted too much money and we could not pay it.

Mr. LILLICK.—We have offered a fair settlement. We would have been willing to arbitrate but counsel upon the other side and his attorney would not pay enough money—

(Testimony of R. A. Hiscox.)

The COURT.—Well, I suppose that is what all law suits are about.

Mr. LILLICK.—Yes, your Honor. However, the vessel was libeled, the cargo was on her; they wanted to reach the cargo as well as the freight; the libel was filed. And that is one of the reasons why the amount was put so low because the parties were so friendly and because it was thought that—

Mr. CAMPBELL.—Well, never mind about that. Let us have the facts. Mr. Lillick, I feel just like this, that we smoked them out; now we want to know what we smoked out.

Mr. LILLICK.—Mr. Campbell, that is very improper. It is hardly proper for you, with your standing before this Court, to say that you have smoked us out. You have done nothing of the sort. In the statement that you have smoked us out you—

The COURT.—We will never get anywhere unless one or the other of you will take up the running and continue.

Mr. LILLICK.—All right, your Honor, we will run. The agreement was made with the crew, it is attached to the answer and reads as follows: [147]

Libelant's Exhibit No. 2—Agreement Dated August 5, 1916, Between Owners of Steamer "Avalon" and Crew.

We, the undersigned officers and members of the crew of the steamer "AVALON," on board said vessel on or about July 25, 1916, during the time said steamer "AVALON" performed services to the

American steamer "GENERAL HUBBARD," by towing said steamer "GENERAL HUBBARD," in a damaged condition, into, or near, the Port of Astoria, Oregon, hereby agree to place, and hereby do place, whatever claim we, or any of us, have against said steamer, "GENERAL HUBBARD," and her cargo, for such services in the hands of the STEAMER AVALON COMPANY, a California corporation, for collection, by suit or otherwise. It being understood that, so far as any claim against said steamer "GENERAL HUBBARD" is concerned, we are to act with the owner of the steamer "AVALON," and the STEAMER AVALON COMPANY is hereby authorized and empowered to settle for the master, owner and crew of the said steamer "AVALON" with the said steamer "GENERAL HUBBARD," and her owners, for such lump sum as the STEAMER AVALON COMPANY may be advised; the several amounts, or proportions, to be paid to the members of said crew to be afterwards adjusted between the owners of the steamer "AVALON" and the undersigned.

In the event that the owners of the steamer "AVALON" and the undersigned, members of her crew, cannot come to an amicable adjustment between themselves, as to their several proportions, the said undersigned to have the privilege of employing independent counsel for the purpose of such settlement between themselves and the owners of the said steamer "AVALON," but not as between themselves and the owners of the said steamer "GENERAL HUBBARD" and her cargo.

In consideration of the aforesaid agreement on the part of the officers and members of the crew of said steamer "AVALON," the said STEAMER AVALON COMPANY hereby promises and agrees to use its best endeavors to secure as large an award for such services as **[148]** lies in its power, to make a just and equitable distribution to the aforesaid undersigned officers and members of the crew of the said steamer "AVALON."

Dated: Redondo, Calif., Aug. 5, 1916.

Now, that was the agreement, if your Honor please, that was entered into by the owners of the "Avalon" with the members of her crew. The vessel was attached, as I remember it, and seized on August 5, was she not?

Mr. CAMPBELL.—About that date.

Mr. LILLICK.—Yes, it was about that date. Mr. Wood went South and obtained this agreement from the sailors. The libel that was filed did not include the right of action of the sailors. The steamer "Avalon" was not representing them in that litigation. I returned from New York, went over the papers and found that Mr. Wood had done with this agreement that had been drawn in the office in accordance with a form that I had in another case, because it has been Mr. Campbell's experience I think as well as my own that in dealing with a situation of this character unless you get the crew to agree to go with you you are going to be involved in another difficulty and another trouble when you come to settle. We thought we were going to settle. That was the situation in the office at the time—

Mr. CAMPBELL.—Let me interrupt you: your libel was filed on August the 1st and that assignment was taken on August 5.

Mr. LILLICK.—That is right. Mr. Wood went down south and got this signed. Mr. Wood in addition to this took from those sailors an assignment in which he specified the amount which he paid them. Now, I am prepared to state to the Court what that amount was but I don't want to state it to the Court. It is not proper. The Court properly ruled upon that question—

The COURT.—Well, I don't know whether I was dreaming, or **[149]** not, but I heard what you stated in your opening statement, that they got half a month's wages.

Mr. LILLICK.—That is in the testimony of the captain of the "General Hubbard." Now again, I repeat, there is before this Court two separate actions; one action by the Steamer Avalon Company, in which of course we expect to have an award, and then there is another action by the captain and the members of the crew. For the benefit of the Hammond Lumber Company and the Hubbard Steamship Company, that kind of proceeding I think will never be taken again, certainly not if my office has anything to do with it.

Mr. CAMPBELL.—Well, we accept your apology.

Mr. LILLICK.—It is not an apology. I resent counsel's imputation. In the first place, I had nothing to do with this, I was out of town. But it was absolutely proper and all right. For counsel to say that he smoked us out, it is not exactly a proper in-

sinuation for Mr. Campbell to make against me when we have known each other so long. **[150]**

Mr. CAMPBELL.—I make no imputation against you whatever; I have too high a regard for you to do so. I want the facts.

Mr. LILLICK.—You have the absolute true facts. I ask again the Court to indicate in your opinion a statement of how the award shall be distributed, what proportion to the Avalon Company and what proportion to the crew, and to specify, if the Court will, that that payment shall be made in accordance with the amounts that the various members of the crew had.

Mr. CAMPBELL.—I will ask you this question, Mr. Lillick, or I will ask it of the witness: As I understand it, after the filing of this libel, Mr. Wood went down to San Pedro and got this document which you have attached to your answer to the interrogatories—

Mr. LILLICK.—You had better have the original.

Mr. CAMPBELL.—I don't care about that. You can file it with the Court.

Mr. LILLICK.—I will have this filed as our exhibit.

(The document was here marked Libelant's Exhibit 2.)

Mr. CAMPBELL.—Now, I understand you to say that after that talk Mr. Wood paid the crew a certain amount of money.

Mr. LILLICK.—He did.

Mr. CAMPBELL.—Is it possible he paid the crew a certain sum of money without procuring some docu-

ment from them, some receipt?

Mr. LILLICK.—I told the Court he procured an assignment.

Mr. CAMPBELL.—We are entitled to see that assignment, I think, so that we may know the character of the assignment. They have attached to the interrogatory and said this is the assignment.

Mr. LILLICK.—I beg your pardon, Mr. Campbell. Now, please read the answers, if you will. The Court said we need not tell you how much we were paid. **[151]**

Mr. CAMPBELL.—"1. In answer to the first interrogatory, libelants allege that they, and each of them, have transferred and assigned unto the Steamer Avalon Company the claims which they had against the steamer "General Hubbard", and her cargo, but upon the understanding that the Steamer Avalon Company might sue to recover the amount due libelants, and, in such suit, commence such proceedings as said Steamer Avalon Company might be advised, under the name, and for the benefit, of libelants.

"2. In answer to the second interrogatory, libelants allege that such transfer was made to the Steamer Avalon Company.

"3. In answer to the third interrogatory, libelants refer to their answer to the preceding interrogatory.

"4. In answer to the fourth interrogatory, libelants allege that said transfer was made upon the 5th day of August, 1916.

"5. In answer to the fifth interrogatory, libel-

ants attach hereto a copy of the transfer made by them, and each of them, to the Steamer Avalon Company."

Now, it appears that there is a subsequent transfer or subsequent assignment to that copy.

Mr. LILLICK.—There is.

Mr. CAMPBELL.—I think I am entitled to have disclosed what that assignment is.

The COURT.—I think you are entitled to all the facts.

Mr. LILLICK.—I don't know where that is, but it will be obtained. We will have to adjourn anyhow until this afternoon. It will be brought out this afternoon. At the same time, if your Honor please, that is produced under objection, because it is objectionable and it ought not to be in the record at all.

The COURT.—Then it ought not to have been made.

Mr. LILLICK.—Your Honor, this is something that my office has nothing to do with. They made it down south. They apparently got down there and said, "We will straighten this thing all [152] out, we have this other arrangement; now, we will just take an assignment from them and clean up the whole thing at once."

Now, you say it ought not to have been made. It ought not to have been made.

The COURT.—I don't say it ought not to have been made, but I say if it was made it should be produced.

Mr. LILLICK.—It was invalid; it was confessedly invalid.

The COURT.—Well, we will take the matter up at two o'clock.

(A recess was here taken until two P. M.) [153]

AFTERNOON SESSION.

Mr. LILLICK.—If your Honor, please, I am going to put on one more witness, with Mr. Campbell's consent.

The COURT.—Very well.

Testimony of William H. Wood, for Libelant.

WILLIAM H. WOOD, called for the libelant, sworn.

Mr. LILLICK.—Q. Mr. Wood, you are the president of the Hart-Wood Lumber Company?

A. Of California.

Q. And of the Steamer Avalon Company you are the president? A. Yes, sir.

Q. Mr. Wood, had you in 1916, another steamer of about the same size as the steamer "Avalon"?

A. The "Solano"; it was a little bit larger.

Q. What were the relative sizes of the two vessels?

A. I think that the "Solano" would carry about 100,000 more than the "Avalon." The "Avalon" carries about a million and the "Solano" about 1,100,000.

Q. What was the difference in their costs.

A. $5,000. The "Solano" cost $5,000 more than the "Avalon."

Q. In 1916, did you have any opportunity to sell the "Solano"? A. I did.

Q. At what price? A. $225,000.

Q. And other than the difference in their cost price,

(Testimony of William H. Wood.)

$5,000, what have you to say as to their difference in value—new or old?

A. The "Solano" was built two years after the "Avalon."

Q. Was the "Avalon" in good shape in 1916?

A. Very good.

Cross-examination.

Mr. CAMPBELL.—Q. You were thoroughly acquainted with the "Avalon" in 1916, were you?

A. Yes, sir. [154]

Q. You say that the "Solano" was a larger vessel than the "Avalon"? A. Yes, sir.

Q. Considerably over 100 tons difference in the two vessels, was there not?

A. Well, I could not say as to the measurement.

Q. Was not the "Solano's" gross tonnage about 943 and the "Avalon's" about 818?

A. Well, that may be correct; I don't know.

Q. The "Avalon" was two years older than the other one? A. That is correct.

Q. Do you recall that the indicated horse-power of the "Solano" was about 700 and that of the "Avalon" about 550?

A. No, that is wrong; they are exactly the same.

Q. Exactly the same?

A. The same size boilers and the same size engine; they are duplicates.

Q. Why didn't you sell the "Solano"?

A. Because I didn't want to.

Q. You needed it in your own personal business.

A. Yes.

(Testimony of William H. Wood.)

Mr. LILLICK.—Q. She was worth $225,000 to you, was she, Mr. Wood?

Mr. CAMPBELL.—Don't do the testifying, Mr. Lillick.

Mr. LILLICK.—Q. Was she worth $225,000 to you, Mr. Wood?

A. I thought she was.

Q. And the other man was willing to pay $225,000 for her? A. Yes, sir.

Mr. CAMPBELL.—Q. When you signed that libel and swore to it, you knew what you were swearing to, did you not?

Mr. LILLICK.—Q. Mr. Wood, since that question has been brought out, you remember that the value of the "Avalon" as specified in that libel was $125,000; in view of the question that Mr. Campbell has just asked you if you knew what was in it, [155] will you state the reason, if any, you had for setting $125,000 as the value of her?

A. At the time we made out the libel, Mr. Olsen asked me what we should put in as the value of the "Avalon", and I told him we didn't want to put in any inflated values on any of our ships, and we would put it in at just exactly what she cost us.

Testimony of A. F. Pillsbury, for Respondent.

A. F. PILLSBURY, called for the respondent, sworn.

Mr. CAMPBELL.—Q. Captain, subsequent to the time, or about the time, that the "General Hubbard" was towed into the Columbia River by the "Avalon,"

(Testimony of A. F. Pillsbury.)

did you make an appraisement or an estimate of the value of the "General Hubbard"?

A. I did.

Q. By whom were you employed to make that, and for what purposes?

A. I think I was employed by the George E. Billings Company; Mr. Wilfred Page is the adjuster for that company. The purpose was for general average, as I understood it.

Q. To be used in a settlement of any rights and liabilities that might exist or result from this service between the cargo and its underwriters and the owner of the vessel and its underwriters?

A. That is my understanding of the purpose of such work, such valuation.

Q. And George E. Billings & Co. were the average adjusters who were making up the adjustment?

A. That is right.

Q. As of what time did you make the appraisal?

A. May I look at my notes?

Q. Yes. I think the Court will tell you that you may refresh your recollection from any memoranda made at that time.

A. I have before me my copy of the valuation report I made. The date it was issued was August 26th, 1916; the date of the valuation [156] was the date of the arrival of the "General Hubbard" at San Pedro, on or about August 6th.

Q. After the "General Hubbard" was towed into the Columbia River, do you know whether or not it is a fact that she was subsequently towed with her

(Testimony of A. F. Pillsbury.)

cargo of lumber to San Pedro from the Columbia River before repairs were made to her disabled propeller? A. That is my understanding.

Q. And this appraisement was made at the termination of that voyage upon which she delivered her cargo at San Pedro? A. Yes, sir.

Q. What, in your judgment, was the value of the "Hubbard" at that time?

A. I placed a value of $350,000 on the "Hubbard" on her arrival in San Pedro in the damaged condition, the damages estimated to cost about $12,000

Q. Do you know what they did in fact cost to repair? A. No, I do not.

Q. Will you state to the Court as fully as you can your knowledge of the market for vessels of the type of the "General Hubbard" at that time, and the factors which you took into consideration, Captain, in fixing this value. What I want you to do is to frankly and openly discuss with the Court, or, rather, tell the Court the basis upon which you arrived at that value.

A. Well, in the first place, I of course, try to keep more or less familiar with the sales and the market values of vessels in this port and on this coast, and to some extent in other parts of the world; as everybody knows, during the last eighteen months, beginning about September, 1915, there has been a very great advance in the value of almost all shipping property, and it is somewhat difficult to make a valuation of vessels since that time. There are several things to be considered. Occasionally a

(Testimony of A. F. Pillsbury.)

buyer comes into the market and pays a very big price for the vessel; [157] then, again, the next day, or the same day, there might be several owners who would be willing to sell at that price, but there would be no buyers. At other times you have to consider and you do consider all the time what it would cost to replace vessels of the class that we are valuing. For instance, if we are to place an order for a new vessel, how much would it cost? The original value is no criterion any more, because the market value is so much greater than the value of a vessel that was built two or three or four years ago. Then there are other things to consider. Owners having a vessel for trade, they do not want to sell at some of the big prices, and, therefore, very properly they say it might be unreasonable to value a vessel at a price that somebody might sell a similar vessel at. In the valuing of the "Hubbard," I took into consideration, as far as I could, the cost of duplicating vessels of a somewhat similar type. An order for a vessel, if placed then, would only get the delivered vessel in about twelve months afterward. That price at that time was about $125 per dead weight ton for the ordinary class steel freight steamer, and it was upon those estimates I based the value of the "Hubbard"—very largely on those figures.

Q. Do you know what kind of buyers the vessels that were sold upon this coast of the type of the "Hubbard" went to?

A. The greater part of them went to Norwegians.

(Testimony of A. F. Pillsbury.)

W. R. Grace & Co. were in the market in the early part of last year and did buy two of our vessels; they bought the "Santa Rita," which was the "William Chatham," and which was a little smaller than the "Hubbard," for either $310,000 or $315,000 net; that I checked up with W. R. Grace & Co. Then they bought the John A. Hooper a few months earlier; she is nearly 4,000 tons dead weight; they paid $525,000 for her. The "Henry Scott" they wanted to buy, but they [158] would not pay the price the owners asked.

Q. After the Norwegians came into the market and began to buy, did they continue buying, or was there subsequently a slump in the market later in the fall?

A. Well, I don't know. I have not been in touch with the Norwegians. I surveyed these vessels—several of them that have been sold; I surveyed them for the sellers. I have not been in touch with the Norwegian purchasers, so I do not know what is in their minds.

The COURT.—Q. That was not exactly the question, Captain. The question was, after they had entered the market and quit buying, if there was then a slump in the market?

A. Well, I understood with one vessel, in fact I think one of the Hammond fleet, the "Fenwick," she was tied up for some little time after she was delivered to her purchaser on account of the purchaser basing his purchase price on a dead weight, which, with the Norwegian free board, would give

(Testimony of A. F. Pillsbury.)

a dead weight much less than he had calculated. I think that when those Norwegian purchasers found out that these vessels could not carry with their freeboard, or with the freeboard of any classification, if assigned, that then they were not so much interested—

Q. That is, you mean they were not so much interested in this type of vessel?

A. In this particular type of vessel, because they are built for lumber carrying.

Q. Was the "Hubbard" a single-deck vessel or a double-deck vessel? A. A single deck.

Q. Was she a vessel with a high or low freeboard?

A. She would have little or no freeboard with lumber.

Q. Had you made a valuation of the "Hubbard" on a previous occasion? A. Yes, I had.

Q. When was that?

A. The valuation was made under date of July 29, 1914, and the valuation was to be made as of date [159] February 16, 1914.

Q. What value did you give her then?

Mr. LILLICK.—We object to that because that is more than a year before this matter.

The COURT.—That seems to be true. If there was a stable valuation running through this period that evidence might be of some value, but it would not throw much light on what a vessel was worth a year and a half after.

Mr. CAMPBELL.—I withdraw that.

Q. When was she built, Captain, and by whom?

(Testimony of A. F. Pillsbury.)

A. The Graig Shipbuilding Company, in 1911.

Q. Do you know what her cost was?

A. Well, I know very closely. On either one of these costs, either one or both. I inquired of her owners as to her cost, and I think they showed me the books; I would not know otherwise very closely; it was about $ 200,000.

Cross-examination.

Mr. LILLICK.—Q. Was not the actual cost $216,000, Captain, instead of $200,000?

A. Well, I don't understand it so.

Q. You say you saw it in their book; I am only speaking from information that I have.

A. I think it was $201,000, or something like that, or thereabouts.

Q. Are you not mistaken as to what you testified to about the "Fenwick" having been held up in her sale by reason of the controversy that arose afterwards, wasn't that another vessel instead of the "Fenwick"?

A. No, I think it was the "Fenwick" that laid over in Oakland for about two weeks.

Q. Was not the "Fenwick" sold for approximately $425,000?

A. I think probably she was.

Q. They took her, in any event, did they not, Captain? A. Yes, sir. [160]

Q. When was the "William Chatham" sold?

A. I don't know whether my books here will show it or not. I will see. I made a report on her and inquired of Grace & Co. what they paid for her, but

(Testimony of A. F. Pillsbury.)

I have not it in this book; this is a 1914 book. I think it was somewhere in March or April.

Q. Of what year?

A. 1916. I don't know that I have it here. I have the "John A. Hooper"; that was in May, 1916.

Q. Do you remember the "Chatham" was sold before or after that?

A. I think she was sold before.

Q. Freight rates had not risen and did not rise until about June, 1916?

A. There had been little or no change in freight rates since early in February, 1916; very little.

Q. You say there has been very little?

A. There has been very little change since February, 1916.

Q. Aren't you mistaken about that, Captain?

A. What are you referring to?

Q. I am referring to lumber freights.

A. Oh, I am referring to general offshore freights.

Q. The lumber rates applicable to vessels running in the coastwise trade, such as the "Avalon" and the "Hubbard" were running in, did not commence to rise until June, 1916?

A. They commenced to rise in December, 1915, or January, 1916, but they had not gone up to their present high prices until midsummer, 1916.

Q. Is the "Chatham" a smaller or a larger vessel than the "Hubbard"?

A. The "Chatham" is a little smaller, but cost more money.

Q. When was the "Santa Rita" sold?

(Testimony of A. F. Pillsbury.)

A. The "Santa Rita" was the "Chatham."

Q. Oh, they changed the name? A. Yes, sir.

Q. You were advised, were you not, Captain, of the sale of the "Hubbard" afterwards?

A. I don't know that I was; I made some [161] inquiries about it.

Q. She was sold in the latter part of August, 1916, wasn't she?

A. I understood she was sold in September, 1916.

Q. Were you told that she was under offer when you made your appraisement of her?

A. I was told she was not. I asked Mr. Stewart if she was under offer.

Q. Would it alter your opinion as to her value if you knew that she was sold for $463,125 in October, 1916?

A. I don't think it would, not for the purpose I made it.

Q. That is just the point, Captain, not for the purpose you made it; as a matter of fact, your appraisements are made generally for insurance purposes, are they not?

A. Usually for adjustments in insurance cases; that is, as I have stated, when I make it for a general average purpose that is the purpose.

Q. And that valuation is ordinarily a valuation that, if it may be deemed conservative or radical, is conservative in its nature rather than radical, is it not?

A. Under all circumstances, I try to get as near as I can to what I think is the fair market price, but

(Testimony of A. F. Pillsbury.)

I would say very frankly, in these very unusual conditions in making a valuation I would be conservative.

Q. You say it would not alter your opinion as to the valuation of the "Hubbard" that she was sold approximately two months after you made your appraisement for over $100,000 more than your valuation, when lumber rates had not stiffened in the meantime?

A. I don't know that I can answer that just the way you put it. If I could answer it in my way, I would say that if a number of vessels of that class had been sold at that figure, it would—if a number had been.

Q. How many vessels of the "Hubbard" and her approximate size were there on this coast at that time? A. About ten. [162]

Q. They were all running in a rather strictly confined trade, were they not?

A. No, the most of those vessels had been chartered to go offshore; it would be more profitable than the coastwise lumber trade.

Q. In computing the valuation you say you put a cost price of $125 a ton at that time? A. Yes.

Q. Did you in computing your valuation figure upon the profit that that vessel might have made running at those rates from the period when the contract might be let and until the vessel might be delivered, it taking a year to complete her?

A. That is a thing, of course, that should be considered; on the other hand, as against that, you would

(Testimony of A. F. Pillsbury.)

get a new vessel as against one five years old, which the "Hubbard."

Q. So, as a matter of fact, your figure of $125 a ton was taken without putting any particular stress upon the value of the vessel as a going investment?

A. No, I won't say that. I think it was, I think it was placed.

Q. Could you state, Captain, how many trips the "Hubbard" could have been expected to make within a year running from the Columbia River to San Pedro?

A. Well, I should suppose that she would make a trip about every seventeen days, or something like that, seventeen or eighteen days.

The COURT.—Q. A round trip?

A. Yes, sir.

Mr. LILLICK.—Q. And the going rate for lumber at that time was $7 a thousand, was it not, I mean in July, 1916? A. Yes.

Q. So that the income from the "Hubbard" during that period would have been that amount less her regular running expenses? A. Yes, sir.

Q. You did not compute that specifically, did you, Captain, in making up your appraisement?

A. I took it into consideration, yes, sir.

Q. And you figured that her depreciation for that year would [163] amount to anywhere near that amount, the amount of her profit running at that rate?

The COURT.—Not for that year, exactly, Mr. Lillick, but for the five years that she was built,

(Testimony of A. F. Pillsbury.)

Mr. LILLICK.—Yes, the captain said that she would depreciate in value and would continue to depreciate; figuring her depreciation from the original cost.

A. Well, as against that there are two things to be considered; that vessel might, on the first or second voyage, be lost, or she might be seriously damaged, which would take three or four months to repair, or she might get into a large salvage case where the owners would have to stand a large part of it. That is one reason why the owners have been willing to sell at these large prices; a number of the owners have told me that themselves.

Q. The market value of steam schooners, however, that have been sold in San Francisco in 1916 was a market value that was placed upon those vessels by the price the owners would sell for? A. Doubtless.

Q. Isn't that true, Captain? A. Yes.

Q. Now, taking into consideration again the fact that this vessel sold for $463,125 two months after your appraisement, would you not say that that appraisement of $350,000 that you made is rather conservative? A. If you wish.

Redirect Examination.

Mr. CAMPBELL.—Q. Captain, were any of these vessels of the type of the "Hubbard" sold for use in the lumber-carrying trade between Puget Sound and San Pedro, or did they go offshore?

A. They all went offshore, so far as I know.

Q. And for a considerable period prior to the first of August 1916, were vessels of the type of the "Hub-

(Testimony of A. F. Pillsbury.)

bard" employed in this lumber trade, or were they employed in the offshore business? [164]

Q. Do you know of any vessel of the type of the "Hubbard" which has been resold to be used in the lumber-carrying trade on the Pacific Coast?

A. No, I know of none.

Q. Where do Grace & Company operate their vessels?

A. Between the Pacific Coast of the United States and the west coast of South America and Central America.

Q. And these vessels that were sold to the Norwegians have been taken where?

A. Well, I don't know; they have gone away from here.

Q. Do you know where the "Vance" went, and the "Fenwick" went? Did they remain on this coast, or did they go to the Atlantic?

A. They have not remained on the Pacific Coast of the United States.

Recross-examination.

Mr. LILLICK.—Q. Captain, they made more money in the offshore trade than in the lumber trade, didn't they?

A. I think so.

Q. Didn't it amount to almost twice as much?

A. Well, I could not state that.

Q. With the Court's permission, and Mr. Campbell's permission, I want to make Mr. Pillsbury my own witness as to the valuation of the "Avalon."

(Testimony of A. F. Pillsbury.)

Captain, what, in your opinion, was the value of the "Avalon" in July, 1916?

A. Well, I suppose if I wanted to buy her I would have to pay about $225,000, if I could get her.

Mr. CAMPBELL.—Q. Had you made any inspection of the "Avalon" at that time?

A. No, sir.

Q. Was she a vessel that you ever had anything to do with at all? A. Yes, sir.

Mr. LILLICK.—Q. You know all about her, don't you, Captain, you have gone over her?

A. I have inspected her on several occasions.

Q. A fine, strong, sea boat, in perfect condition, wasn't she,— [165] kept up, I mean?

A. I assume she was; when I last saw her she was in good condition; she was a well-built vessel.

Mr. CAMPBELL.—I desire to offer in evidence a certified copy of the weather bureau report from the North Head station at the mouth of the Columbia River at the time of this happening.

Mr. LILLICK.—No objection.

(The document was here marked Respondent's Exhibit "A.")

Mr. CAMPBELL.—I offer in evidence the depositions of Charles A. Watts, the master of the "General Hubbard," and of Gustave W. Johnson, the chief officer of the "General Hubbard."

Mr. LILLICK.—We took a deposition at Astoria, the deposition of the master of the United States Life Saving Station. The original deposition does not seem to have reached the court.

(Testimony of A. F. Pillsbury.)

Mr. LILLICK.—I will stipulate to a copy if you say it is correct.

Mr. CAMPBELL.—Mr. Burnett said that he had received a letter from the counsel in Astoria who took the deposition on our behalf and the letter indicated that the deposition had been sent to me; they had sent a copy of it to me; the original seems to have been mislaid in the mails.

Mr. LILLICK.—The copy may be admitted as of the same force and effect as the original.

Mr. CAMPBELL.—All I know is that this is said to be a copy of it. If the original does reach the Court, I would like to have leave to withdraw the copy; it is the deposition of O. S. Wickland.

I offer in evidence this assignment that has been produced. I will read it. (Reading:)

Respondent's Exhibit "B"—Assignment, Dated August 5, 1916.

FOR AND IN CONSIDERATION of an amount of money equal to one-half month's salary in accordance with the pay-roll of the [166] steamer "AVALON," the receipt whereof is hereby acknowledged by each of us in our respective claims, we, the undersigned, officers and members of the crew of the steamer "AVALON," on board said vessel on or about July 25th, 1916, during the time said steamer "AVALON" performed services to the American steamer "GENERAL HUBBARD," by towing said steamer "GENERAL HUBBARD," in a damaged condition, into or near the port of Astoria, Oregon,

do and each of us do hereby sell, assign, transfer, set over and deliver to STEAMER AVALON COMPANY our respective claims for such services as hereinabove mentioned as we and each of us may be entitled to so far as any claim against said steamer "GENERAL HUBBARD" is concerned.

IT IS FURTHER UNDERSTOOD that we and each of us, so far as any claim against the said steamer "GENERAL HUBBARD" is concerned, are to act with the owners of the steamer "AVALON" and hereby promise and agree to use our best endeavors to secure as large an award for such services as lies in our power, and we and each of us hereby agree to hereafter execute any release, satisfaction, power of attorney or other legal instrument as may be required by the STEAMER AVALON COMPANY in settling its claim against the said steamer "GENERAL HUBBARD."

Dated Redondo, Calif., Aug. 5th, 1916.

And then follow the names, beginning with the name J. L. Christensen and twenty-two other names. I assume that the other 22 were all of the members of the crew.

Mr. LILLICK.—All of those were members of the crew of the "Avalon."

Mr. CAMPBELL.—And those are all of the members of the crew.

Mr. LILLICK.—I so understand it. We object to the introduction of the document in evidence on the ground that it is invalid [167] and is immaterial, irrelevant and incompetent.

(Testimony of L. C. Stewart.)

(The document was here marked Respondent's Exhibit "B.")

Mr. CAMPBELL.—That is our case.

Testimony of L. C. Stewart, for Libelant (Recalled).

L. C. STEWART, recalled for libelant.

Mr. LILLICK.—Q. Mr. Stewart, have you with you a list of the cost of the steamer "General Hubbard"?

A. No. I can say that the price paid the Craig Shipbuilding Company was $200,000.

Q. Wasn't there an additional $16,000 put on by way of equipment?

A. No, sir. The vessel complete and ready for sea, fully equipped with cargo gear, galley and cabin supplies, was $209,329.66.

Mr. LILLICK.—That is all.

(Thereupon the cause was submitted on briefs to be filed in 15 and 15.)

[Endorsed]: Filed Apr. 12, 1917. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [168]

In the Southern Division of the United States District Court, for the Northern District of California.

IN ADMIRALTY—No. 16,110.

J. L. CHRISTENSEN et al.,

Libelants,

vs.

HUBBARD STEAMSHIP COMPANY, a Corporation, et al.,

Respondents.

No. 16,075.

STEAMER AVALON COMPANY,

Libelant,

vs.

The American Steamer "GENERAL HUBBARD," etc.,

Respondent.

HUBBARD STEAMSHIP COMPANY, a Corporation,

Claimant.

(Opinion and Order to Enter Decree in Favor of Libelant for the Sum of $2,000 and Costs.)

MEMORANDUM.

These cases were heard together. Time is not at my disposal to review the testimony presented. My conclusions from it are as follows:

1. The service performed by the "Avalon" to the "General Hubbard" were salvage instead of towage

services, but were not attended by any special danger. [169]

2. The crew of the "Avalon" have assigned to her owners all their claims to salvage for one-half month's pay; such amount not being unreasonable, the assignment will not be disturbed.

3. The "Avalon" is entitled to an award of $2,000 for all the services performed, including the services of her crew.

A decree will be entered accordingly in favor of libelant, the Avalon Steamship Company, for $2,000 and costs.

The libel of the master and crew, No. 16,110, will be dismissed.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Feb. 8, 1918. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [170]

In the District Court of the United States, for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,075.

STEAMER AVALON COMPANY,
Libelant,

vs.

The American Steamer "GENERAL HUBBARD," Her Engines, Boilers, Machinery, Tackle, Apparel, Furniture and Cargo,
Respondent.

HUBBARD STEAMSHIP COMPANY, a Corporation,
Claimant.

Final Decree.

This cause coming on regularly for hearing the 26th day of March, 1917, libelant appearing by its proctor, Ira S. Lillick, Esq., and claimant and respondent appearing by its proctor, Ira A. Campbell, Esq.

AND IT APPEARING THAT THE COURT has heretofore filed its opinion herein, finding that a salvage service was performed by libelant and that the reasonable value of said service was the sum of Two Thousand (2,000) Dollars.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that libelant do have and recover from the said claimant, Hubbard Steamship Company, a corporation, the sum of Two Thousand (2,000) Dollars, together with interest thereon at the rate of six (6) per cent per annum from the 8th day of February, 1918, [171] until paid, and costs to be hereinafter taxed.

AND IT FURTHER APPEARING TO THE COURT that said steamer "General Hubbard" has been released to the claimant thereof upon stipulation for value.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that unless this decree be satisfied or an appeal be taken therefrom within the time limited by law and the rules of this court, that the claimant and stipulator on behalf of the said steamer "General Hubbard" do cause the engagement in said stipulation to be performed, or to show cause within four days after the expiration of the time to appeal why execution should not issue against them and

each of them, and, if said cause be not shown, that execution be and the same is hereby awarded against said claimant and respondent and said stipulator.

Dated February 25, 1918.

M. T. DOOLING,
District Judge.

[Endorsed]: Service of the within Final Decree and receipt of a copy is hereby admitted this 19th day of February, 1918.

IRA S. LILLICK,
Proctor for Libelant.

Filed Feb. 25, 1918. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [172]

In the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,075.

STEAMER AVALON COMPANY, a Corporation,
Libelant,

vs.

The American Steamer "GENERAL HUBBARD", Her Engines, Boilers, Machinery Tackle, Furniture, and Cargo,
Respondent.

HUBBARD STEAMSHIP COMPANY, a Corporation,
Claimant.

Notice of Appeal.

To the Clerk of the above-entitled Court and to the Respondent and the Claimant Herein, and to Messrs. Ira A. Campbell and McCutchen, Olney & Willard, Their Proctors:

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the Steamer Avalon Company, a corporation, libelant herein, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit, from the final decree of the District Court of the United States for the Northern District of California, entered in said cause upon the 25th day of February, 1918.

Dated: June 20, 1918.

IRA S. LILLICK,
Proctor for Libelant.

[Endorsed]: Receipt of a copy of the within notice of appeal is hereby admitted this 20th day of June, 1918.

McCUTCHEN, OLNEY & WILLARD,
Proctors for Claimant.

Filed Jan. 25, 1918. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [173]

In the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,075.

STEAMER AVALON COMPANY, a Corporation,
Libelant,

vs.

The American Steamer "GENERAL HUBBARD", Her Engines, Boilers, Machinery, Tackle, Furniture, and Cargo,
Respondent.

HUBBARD STEAMSHIP COMPANY, a Corporation,
Claimant.

Assignment of Errors.

Now comes Steamer Avalon Company, a corporation, libelant in the above-entitled cause, and claims that in the record, opinion, decision, decree and proceedings in the above-entitled matter, in the above-entitled court, there is manifest and material error, and said appellant now makes, files and presents the following assignment of errors upon which it relies, to wit:

1. The Court erred in awarding inadequate salvage to the above-named libelant.

2. The Court erred in finding and holding that the services performed by the steamer "Avalon" to the steamer "General Hubbard" were not attended by any special danger.

3. The Court erred in not finding and holding that the circumstances and conditions attendant upon making fast the hawsers of the steamer "Avalon" to the steamer "General Hubbard" were dangerous to said steamer "Avalon," whereby she might have sustained damage. [174]

4. The Court erred in not taking into consideration the value of the steamer and cargo salved, in connection with the value of the salving steamer, together with the earning power of said salving steamer and the damages which she was likely to sustain from the commencement until the end of her salvage service.

5. The Court erred in finding and holding that Two Thousand Dollars ($2,000) was a sufficient award for the service of the steamer "Avalon," including the service of her crew.

In order that the foregoing assignment of errors may be and appear of record, said appellant herein files and presents the same to said court, and prays such disposition to be made thereof as is in accordance with the law and the statutes of the United States in such case made and provided, and said appellant prays the reversal of the above-mentioned decree and that such judgment be entered as ought to have been rendered by the District Court of the United States, Southern Division of the Northern District of the State of California.

Dated: San Francisco, Cal., June 28th, 1918.

IRA S. LILLICK,
Proctor for Libelant.

[Endorsed]: Due service and receipt of a copy of the within Assignment of Errors is hereby admitted this 28th day of June, 1918.

McCUTCHEN, OLNEY & WILLARD,
Proctors for Claimant.

Filed Jul. 2, 1918. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [175]

In the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,075.

STEAMER AVALON COMPANY, a Corporation,
Libelant,

vs.

The American Steamer "GENERAL HUBBARD," Her Engines, Boilers, Machinery, Tackle, Furniture, and Cargo,
Respondent.

HUBBARD STEAMSHIP COMPANY, a Corporation,
Claimant.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS: That we, Steamer Avalon Company, a corporation, as principal, and R. A. Hiscox, whose address is Fife Building, #1 Drumm Street, in the city and county of San Francisco, State of California, and J. Fred Barg, whose address is Fife Building, #1 Drumm Street, in the city and county of San Francisco, State

of California, as sureties, are held and firmly bound unto the General Hubbard Company, a corporation, in the sum of Two Hundred and Fifty Dollars ($250), to be paid to the said General Hubbard Company, a corporation, its successors or assigns, for the payment of which, well and truly to be made, we bind ourselves, and each of us, and each of our, heirs, executors and administrators, jointly and severally firmly by these presents; sealed with our seals and dated the 19th day of June, 1918.

WHEREAS, Steamer Avalon Company, a corporation, has prosecuted an appeal to the United States Circuit Court of Appeals for the [176] Ninth Circuit from a decree of the District Court of the United States, bearing date, the 25th day of February, 1918, in a suit wherein Steamer Avalon Company, a corporation, is libelant against the American steamer "General Hubbard," her engines, machinery, tackle, furniture and cargo, and wherein Hubbard Steamship Company, a corporation, is claimant:

NOW, THEREFORE, the condition of this obligation is such that if the above-named appellant, Steamer Avalon Company, a corporation, shall prosecute said appeal with effect, and pay all costs which may be awarded against it as such appellant, if the appeal is not sustained, then this obligation shall be void; otherwise the same shall be and remain in full force and effect.

J. FRED BARG.
R. A. HISCOX.
STEAMER AVALON COMPANY.
[Seal] By R. A. HISCOX,
Secty.

The foregoing bond is hereby approved as to form and amount and sufficiency of sureties, and notice of filing said bond is hereby waived.

McCUTCHEN, OLNEY & WILLARD,
Proctors for Claimant.

The foregoing cost bond is hereby allowed and approved this 25th day of June, 1918, and the same may operate as a Cost Bond in said cause, pending the termination of said appeal.

M. T. DOOLING,
District Judge. [177]

United States of America,
Northern District of California,—ss.

R. A. Hiscox and J. Fred Barg, being severally duly sworn, each deposes and says: That he resides in the Northern District of California, and that he is worth the sum of Two Hundred and Fifty Dollars ($250) over and above all his just debts and liabilities.

R. A. HISCOX.
J. FRED BARG.

Subscribed and sworn to before me this 19th day of June, A. D. 1918.

[Seal] J. R. CORNELL,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Jun. 25, 1918. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [178]

In the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,075.

STEAMER AVALON COMPANY, a Corporation,
Libelant,

vs.

The American Steamer "GENERAL HUBBARD," Her Engines, Boilers, Machinery, Tackle, Furniture and Cargo,
Respondent,

STEAMER AVALON COMPANY, a Corporation,
Claimant.

Stipulation and Order Concerning Original Exhibits.

IT IS HEREBY STIPULATED AND AGREED, by and between the proctors for the respective parties hereto, that all the exhibits introduced in evidence at the hearing of the above-entitled action, before the above-entitled Court, may be omitted from the Apostles on Appeal in said cause, and may be filed in the United States Circuit Court of Appeals for the Ninth District, in the original form in which they were respectively introduced before said Court at the trial of said case, and be considered as original exhibits for the Apostles on Appeal, and said exhibits need not be printed.

Dated: June 20, 1918.

IRA S. LILLICK,
Proctor for Libelant.

McCUTCHEN, OLNEY & WILLARD,
Proctors for Claimant and Respondent.

It is so ordered.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Jun. 25, 1918. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [179]

In the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,075.

STEAMER AVALON COMPANY, a Corporation,
Libelant,

vs.

The American Steamer "GENERAL HUBBARD," Her Engines, Boilers, Machinery, Tackle, Furniture and Cargo,
Respondent,

HUBBARD STEAMSHIP COMPANY, a Corporation,
Claimant.

Stipulation and Order Extending Time to File Apostles on Appeal.

IT IS HEREBY STIPULATED AND AGREED that the time for printing the record and

filing and docketing this cause on appeal in the United States Circuit Court of Appeals, for the Ninth Circuit may be extended to and including the 17th day of August, 1918.

Dated: San Francisco, California, July 17, 1918.

EDWARD J. McCUTCHEN,
McCUTCHEN, OLNEY & WILLARD,
Proctors for Respondent and Claimant. [180]

Order.

Pursuant to the foregoing stipulation, it is hereby ordered that the time for the printing of the record, and docketing this cause on appeal in the United States Circuit Court of Appeals for the Ninth Circuit, be, and the same is hereby, enlarged and extended to and including the 17th day of August, 1918.

Dated: San Francisco, California, July 20, 1918.

JEREMIAH NETERER,
District Judge.

[Endorsed]: Filed Jul. 20, 1918. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [181]

Certificate of Clerk U. S. District Court to Apostles on Appeal.

I, Walter B. Maling, Clerk of the District Court of the United States of America for the Northern District of California, do hereby certify that the foregoing 181 pages, numbered from 1 to 181, inclusive, contain a full, true and correct transcript of certain records and proceedings, in the case of Steamer

Avalon Company, a Corporation, Libelant, vs. The American Steamer "General Hubbard," etc., No. 16,075, as the same now remain on file and of record in the office of the clerk of said District Court; said transcript having been prepared pursuant to and in accordance with the "Praecipe for Apostles on Appeal" (a copy of which is embodied in this transcript), and the instructions of the proctor for libelant and appellant herein.

I further certify that the cost for preparing and certifying the foregoing Apostles on Appeal is the sum of Seventy-three Dollars and Ninety Cents ($73.90), and that the same has been paid to me by the proctor for libelant herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 14th day of August, A. D. 1918.

[Seal] WALTER B. MALING,
Clerk.
By C. M. Taylor,
Deputy Clerk. [182]

[Endorsed]: No. 3197. United States Circuit Court of Appeals for the Ninth Circuit. Steamer Avalon Company, a Corporation, Appellant, vs. Hubbard Steamship Company, a Corporation, Claimant of the American Steamer "General Hubbard," Her Engines, Boilers, Machinery, Tackle, Furniture, and Cargo, Appellee. Apostles on Appeal. Upon Ap-

peal from the Southern Division of the United States District Court for the Northern District of California, First Division.

Filed August 14, 1918.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 3197

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

STEAMER AVALON COMPANY (a corporation),

Appellant,

vs.

HUBBARD STEAMSHIP COMPANY (a corporation), claimant of the American steamer "General Hubbard," her engines, boilers, machinery, tackle, apparel, furniture and cargo,

Appellee.

BRIEF FOR APPELLANT

On Appeal from the Southern Division of the United States District Court, for the Northern District of California, First Division.

IRA S. LILLICK,
Proctor for Appellant.

No. 3197

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

STEAMER AVALON COMPANY (a corporation),

Appellant,

vs.

HUBBARD STEAMSHIP COMPANY (a corporation), claimant of the American steamer "General Hubbard," her engines, boilers, machinery, tackle, apparel, furniture and cargo,

Appellee.

BRIEF FOR APPELLANT

On Appeal from the Southern Division of the United States District Court, for the Northern District of California, First Division.

Statement of the Case.

This is an appeal from the final decree of the Southern Division of the United States District Court, for the Northern District of California, which final decree awarded to appellant above

named (libelant below) the sum of two thousand ($2000) dollars for salvage services performed by said appellant and by the master and crew of the steamer "Avalon" to and for the American steamer "General Hubbard". (Apostles on Appeal, p. 210.) The action was a consolidated suit for salvage arising out of two libels, one filed by the owner of the steamer "Avalon" and the other by her master and crew. The same issues are raised in both actions, and the court below, in its opinion, made the award to appellant include that for the services of the master and crew. (Apostles on Appeal, p. 199.)

About midnight on the 24th day of July, 1916, the steamer "General Hubbard", while on a voyage from the Columbia River to the port of San Pedro, with a cargo of lumber, became disabled off the Oregon coast, at a point about fourteen miles N. E. ¼ East from Cape Meares, by reason of the breaking of her propeller shaft. Rolling in the trough of the sea, and without wireless equipment to enable her to make known her plight, she immediately sent up signals of distress, which were observed some time later by the steamer "Avalon", then at a point about four miles off Cape Meares' lighthouse, and on a voyage north to Willapa Harbor, in the State of Washington. The "Avalon" immediately changed her course, went to the assistance of the disabled vessel, and, at the request of her master, and after somewhat difficult maneuvering, passed a hawser to

her. Thereafter, the "Avalon" proceeded with the "General Hubbard" in tow toward the port of Astoria, and, with considerable danger, passed the entrance to the river and arrived safely at Astoria at 8:20 P. M. upon the 25th day of July, 1916.

In the lower court the claimant (appellee here) denied that the steamer "General Hubbard" was in distress at the time the distress signals were given by her, and maintained that she was merely disabled and in need of assistance. It was further denied that the service rendered by the "Avalon" was attended with any peril, or that the hawser was passed to the "General Hubbard" under difficult or dangerous conditions.

We were, therefore, met with the usual defense in a salvage suit, to wit, that it was quite out of the question that the salving vessel might have been damaged in performing the service, and that the service was merely the result of an agreement which could have been made with any one of numerous steamers with which communication might have been established.

Specification of Errors Relied Upon by Appellant.

Appellant's assignment of errors, presented and filed in the court below, is based upon the errors of the lower court in its findings concerning, and its

value of the property saved. (6) The degree of danger from which the property was rescued."

The court also says, in reference to the well-known rule, that public policy requires a liberal reward in salvage cases:

"Compensation as salvage is not viewed by the admiralty courts merely as pay, on the principle of a *quantum meruit,* or as a remuneration *pro opere et labore,* but as a reward given for perilous services, voluntarily rendered, and as an inducement to seamen and others to embark in such undertakings to save life and property.

"*Wms. & Bruce,* Adm. Prac., 116; 2 Pars. Ship., 292."

"The Daniel Steinman", 19 Fed. 918:

"It is a service not deemed desirable by owners of steamers, and the increasing importance of encouraging it has called from this court expressions which need not be repeated here. *'The Edam',* 13 Fed. Rep. 135. In *'The Rio Lima',* 24 Mitch. Mar. Reg. 628, Sir Robert Phillimore says:

" 'It has been impressed on the minds of the court that there seems to be a growing dislike on the part of owners of ships to allow their vessels to render assistance, even where no jeopardy of life is concerned. That must be met by a liberal allowance on the part of the court whose duty it is to consider all the circumstances of the case.' "

"The Grace Dollar", 103 Fed. 665;

"The Ereza", 124 Fed. 659.

The Value of the Property in Peril.

A question of prime importance for the consideration of this court is the character and value of the salvaged vessel, with her cargo, and of the value of the property hazarded in assisting the vessel in distress. On this point the libel as amended alleges that the value of the "Avalon" was two hundred thousand dollars ($200,000); that the value of the "General Hubbard" was four hundred sixty-five thousand dollars ($465,000), and that the value of the cargo on board the latter vessel was about twenty-five thousand dollars ($25,000). The evidence produced at the trial proved that the "Avalon" was of the steam schooner type, built for the lumber trade, in 1912, at a cost of one hundred twenty-five thousand dollars ($125,000); that during the year of 1916 the owner, the appellant herein, and libelant below, was offered on various occasions by ship owners sums ranging from two hundred thousand dollars ($200,000) to two hundred twenty-five thousand dollars ($225,000) for the vessel. (Hiscox, Apostles pp. 154, 155.) This witness, the secretary of the libelant company, knew the values of vessels of a similar type sold in the market at the port of San Francisco, and was of the opinion that the vessel had a market value of about two hundred thousand dollars ($200,000) in July, 1916. On his cross examination it appeared that market values for this type of vessel during the entire year of 1916 were increasing and that the market became quite

active along in June, and that freight rates increased very rapidly the first part of the year, reaching the maximum in June, and had held at that rate up to the time of trial. (Apostles p. 155.)

Witness Parr, called for the libelant below, had been in the steamship business for thirteen years, and showed by his testimony that he was well acquainted with the values of steam schooners on this coast. He knew the "Avalon" and placed a market value of one hundred seventy-five thousand dollars ($175,000) on her in June, 1916. (Apostles p. 159.) Captain Pillsbury, for appellee, when asked what, in his opinion, was the value of the "Avalon" in June, 1916, said: "Well, I suppose if I wanted to buy her I would have to pay about two hundred and twenty-five thousand dollars ($225,000) if I could get her. (Apostles pp. 193, 194.) The appellee offered no testimony on this point.

As to the value of the "General Hubbard", respondent's witness, Captain Pillsbury, testified that he appraised the vessel at three hundred fifty thousand dollars ($350,000) in her damaged condition, and estimated the necessary repairs at twelve thousand dollars ($12,000), making a total of three hundred sixty-two thousand dollars ($362,000). (Apostles p. 183.) That this is a low estimate appears from the captain's statement on cross-examination; that the fact that the "General Hubbard" was sold for four hundred sixty-three thousand, one hundred twenty-five dollars ($463,125) in cash (Stewart, Apostles p. 148) would not alter his opinion, as

his appraisal was made for a *special purpose—insurance.* (Apostles p. 189.) He admitted that three hundred fifty thousand dollars ($350,000) was a rather conservative appraisement of the vessel. (Apostles p. 192.) Also that the "General Hubbard" was built for the lumber trade (Apostles p. 186) in 1911, at an approximate cost of two hundred thousand dollars ($200,000). (Apostles p. 187.)

Witness Stewart, vice president of the claimant company, testified that the mill value of the lumber on board the "General Hubbard" at the time in question was fifteen thousand, eight hundred one and 21/100 dollars ($15,801.21), and that the freight was nine thousand, eight hundred eighty-one and 46/100 dollars ($9881.46). (Apostles p. 153.) So, for the present purpose, it may be considered that the total value of the property in peril on this undertaking was approximately six hundred twenty-six thousand, six hundred eighty-two dollars ($626,-682), and that of the property saved approximately four hundred twenty-six thousand, six hundred eighty-two dollars ($426,682). In the light of these facts, the sum of two thousand dollars ($2000) awarded by the court below for the salvage service performed can be seen to be entirely inadequate in consideration of the value of the property salved and the salving steamer, the "Avalon".

It is not our purpose to cite a long list of salvage cases and to contend that an award should be made in the instant case equal to awards made in the cases cited. We think, however, that it will ma-

terially assist this court in reaching a proper determination to call attention to a few cases where awards have been made for saving property of approximately the same value as the property saved in the present case. The court may then, as a guide in the way of precedent, pass upon the award made in the instant case in the lower court, and, considering the various elements of the cases cited, in comparison with those of the instant case, plainly perceive that the award made in the lower court was entirely inadequate to the service performed.

"The Gallego", 30 Fed. 271.

The steamer "Lone Star", valued at two hundred thousand dollars ($200,000), found the steamer "Gallego" drifting about twelve (12) miles off the east coast of Florida, with her rudder gone. The value of the "Gallego" with her cargo was found to be four hundred seventy-six thousand, four hundred sixty-four dollars ($476,464). The "Lone Star" made fast to her stern with hawsers and served as a rudder, thus assisting her to the port of Havana, where she arrived safely five days later. One storm was encountered, but the weather most of the time was calm. The court made an award of twenty-five thousand dollars ($25,000) to the "Lone Star" for the salvage service, and an additional two thousand four hundred fifty-one and 96/100 dollars ($2451.96) for actual damage incurred.

"The Italia", 42 Fed. 416:

The Steamer "Italia" broke her tunnel shaft, but made temporary repairs and proceeded on her voyage to New York at about three (3) knots. Her sails were set, but they were of no practical value in making headway. After covering two hundred and thirty-four (234) miles in this condition she was picked up by the libelant's vessel, also bound to New York, and towed to that port; the service occupying about four days. The weather was at times stormy, but the "Italia" was at no time completely disabled. The value of the "Italia", with her cargo and freight, was four hundred seventy-three thousand, four hundred twenty-one and 88/100 dollars ($473,421.88), and the libelant's vessel four hundred thousand dollars ($400,000). The salvage award was fixed at twenty-five thousand dollars ($25,000).

"The Charles Wetmore", 51 Fed. 449:

> "The 'whaleback' steamer W., valued, with her cargo, at $409,219, lost her rudder plates and was drifting shoreward in a storm near Tillamook Rock about 30 miles south of the mouth of the Columbia River. The steamer 'Zambesi', worth $220,000, bound from Victoria, B. C., to Portland, Or., having been driven south of the Columbia, discovered the 'Wetmore' flying signals of distress. With some difficulty a hawser was made fast, and the 'Wetmore' was towed near the mouth of the Columbia, but, no pilot being available, the vessels were held off the bar until next morning.

> The 'Zambesi' then steamed for the river, but when three and a half miles off McKenzie's Head, the hawser parted. It was recovered and again made fast during a period of increasing danger. A pilot was procured, and the bar was crossed in safety. The 'Wetmore', being very heavy, yawed from side to side, rendering it necessary to cross the bar very slowly, and, as the tide was flooding, the heavy seas traveled faster than the 'Zambesi', thus beating upon and sweeping over her, straining her decks, breaking in her house, and otherwise injuring and imperilling her. *Held,* that $20,000 should be allowed for salvage and distributed, $7000 to the 'Zambesi', $5000 to her master, $5000 to her crew, $2000 to the pilot, and $1000 to the mate."

"The Chatfield", 52 Fed. 479:

This steamship broke her propeller shaft when about fifty-three (53) miles out of port. She was picked up by the steamship "Brixham" and towed for nine (9) hours, part of the way back to port, the tow being completed by the steamship "City of Augusta" in twelve hours' time. The "Chatfield" was valued at four hundred thirty-five thousand dollars ($435,000). With her cargo and freight, the "Brixham", eighty thousand dollars ($80,000), and the "City of Augusta" at four hundred forty thousand dollars ($440,000). The weather was very stormy during the time the service was rendered, but the court said that the service could not be classed as of the highest grade of merit, on account of injuries to the saved vessel by collision during the tow. The award for both vessels was fixed at

twenty-seven thousand five hundred dollars ($27,-500).

"The Sun", 161 Fed. 385:

The steamship "Norwood" served as a rudder for the steamship "Sun", whose rudder stock was broken, and in this manner they proceeded about four hundred (400) miles to New York. The "Sun" was worth about five hundred thousand dollars ($500,000), and the "Norwood" from sixty thousand to seventy thousand dollars. It was pointed out by the court that the salvors encountered no extraordinary dangers, nor was any great skill or labor required of them; that the "Norwood" was in no peril and, while the peril from which the "Sun" was rescued was actual, still it was not immediately extreme. Also, the award would be larger if the "Norwood" had towed the "Sun", instead of merely serving as a rudder for her. A salvage award of thirteen thousand five hundred dollars ($13,500) was made, together with six hundred seventy-two and 38/100 dollars ($672.38) for expenses and costs

In the recent case of *Merritt & Chapman Derrick & Wrecking Co. v. "The Sahara"*, 246 Fed. 141, Judge Rose, of the Maryland district, awarded the sum of twelve thousand five hundred dollars ($12,-500) on a value salved of four hundred thousand dollars ($400,000), and a value of the salving property of only one hundred thousand $100,000). In that case the vessel grounded on the Atlantic coast of Virginia, near Ship Shoal Inlet; was not in a

position of much danger, and was relieved at high water by a few hours' work of the wrecking tug "Rescue" without assistance from the "Sahara's" engines. In the case cited neither the crew nor the "Rescue" encountered serious risk.

When the case at bar is considered in the light of the foregoing cases, and the value of the "General Hubbard" and her cargo and of the "Avalon" is taken into consideration, in comparison with the value of the property salved in the cases cited, it will be plainly evident, we think, to this court that the award of two thousand dollars ($2000), made in the court below, for the salving of the "General Hubbard", and her cargo, is ridiculously small. We unhesitatingly ask that it be raised to at least $10,000. At the time the "General Hubbard" was in distress we are satisfied her owners would have been glad to agree to pay $12,500 or $15,000 for the assurance that she would be delivered safely at Columbia River.

Having established, therefore, the error of the lower court in awarding salvage inadequate in amount for the services performed by both the "Avalon" and her master and crew; and having thus shown that the value of the steamer and cargo salved and of the salving steamer, together with the earning power of the latter, and the damages which she was likely to sustain during the salvage service were not properly considered by the lower court in making its award; it but remains for us to establish that the lower court did not properly consider and

find as to the sole other element necessary to establish our claim that we are entitled to an award greater than that made by the court below, to wit: That

2. THE COURT ERRED IN FINDING AND HOLDING THAT THE SERVICES PERFORMED BY THE STEAMER "AVALON" TO THE STEAMER "GENERAL HUBBARD" WERE NOT ATTENDED BY ANY SPECIAL DANGER.

The court below in its opinion held that the salvage services performed by the "Avalon" to the "General Hubbard" were not attended by any special danger (Apostles on Appeal, pp. 198, 199), and for that reason made the award which we contend was, and is, an inadequate reward. We here desire to present our argument as to Assignments of Error 2 and 3, hereinbefore set forth, for the reason that the services performed by the "Avalon" to the "General Hubbard" included the making fast of the hawsers of the former to the latter, and because the element of danger was present throughout the entire salvage service.

The Circumstances Surrounding the Rescue.

Captain Christensen, master of the "Avalon", called for the libelant, gives the story of the rescue in substance as follows (Deposition, direct examination, Apostles on Appeal pp. 24 et seq.):

> "I have been going to sea twenty-six (26) years and during seventeen (17) years of that time I served as master; before that I was first officer, second officer and third officer. I

have been master of the 'Avalon' over four years.

On the night of June 24th-25th, about twenty minutes past twelve, we were about fourteen (14) miles west-northwest of Cape Meares. I was asleep in my room when the first officer came and called me. He told me that there was a steamer to westward sending up distress rockets and playing the searchlight in the sky. We were about three and a half (3½) miles aft of her when I got up on the bridge and she was still playing her searchlights up. When I got up close to him I stopped my ship and hailed him. I said, 'Captain, what can I do for you?' and he said, 'I am broke down. Can you tow me to Astoria?' and I said, 'Why, certainly, I will try it.' I then went out to the west a little, got my hawser and things ready and started to pick him up; to get him in tow. The wind, a light breeze, was west-northwest and a moderate swell was running, a northwest swell. The 'General Hubbard' was lying headed about W. S. W. She was lying right in the trough of the sea, rolling. She had a cargo of lumber on board and a deckload about sixteen (16) feet high.

Q. Do you know from what you saw whether the 'General Hubbard' was able to keep her head up to sea?

A. Not the way she was lying there; she was lying in the trough of the sea, and she had no means, as her engine was disabled and there were no sails bent on the masts.

I went up alongside of her first and steamed up ahead a little bit, stopped my engine and gradually let my ship drop astern until I got within 30 or 40 feet of him—my stern from his bow—and then I threw a heaving line to him. He made fast to the 'Avalon's' hawser and we started for Astoria about 2:30 o'clock and arrived off the Columbia River at

the bell buoy about 4:30 o'clock. It was a dark night; the stars were shining, but there was no moon."

Nothing further of importance was brought out in the cross-examination, but in the redirect examination of this witness (Deposition, Apostles on Appeal pp. 33, 34) it appears that no other vessels were in the vicinity except one about five (5) miles inside the "Avalon". She did not come up at all, and probably did not see the signals of distress sent up by the "General Hubbard".

The next witness for libelant, Peter Rodland, the chief engineer of the "Avalon", corroborates the testimony of the captain that the "General Hubbard" was lying in the trough of the sea, and says that he saw no other vessels except the steamer inside when they maneuvered to get the hawser on board. (Apostles on Appeal, pp 36, 37.)

In regard to the distress signals sent up by the "General Hubbard", her captain testified as follows (Watts' Deposition, Apostles on Appeal, pp. 95, 96):

"Q. What rockets did you send up first?

A. I sent up the ordinary rockets, you know, the ordinary rockets that burst in stars.

Q. How many did you send up the first time?

A. I could not tell you how many I sent up; I used to send one up every 15 or 20 minutes.

Q. Didn't you send up first three or four in rapid succession and then wait a little while?

A. No, I never done that at any time; I sent them up myself, too.

Q. You sent up one?

A. One; and then after sending up one rocket I burned a blue light.

Q. Then you waited for 15 minutes?

A. Yes, 15 or 20 minutes.

Q. In the meantime you received no answering rocket?

A. Received no answer at all.

Q. Then you sent up another rocket, burnt another light, and no answer?

A. Yes.

Q. And then the third time you saw the lights of the 'Avalon', did I understand you?

A. Well, I think it was more than that; it was the fourth or fifth time before we saw the lights of the steamer which afterward turned out to be the 'Avalon'."

This witness also stated that the "General Hubbard" carried no wireless and no attempt was made to rig up any sort of sails. (Apostles on Appeal pp. 98, 99.)

There is no material conflict in the testimony up to this point except with reference to the effect of the wind, sea and swell upon the "General Hubbard" when she was lying in the trough of the sea before she was taken in tow by the "Avalon". We think, however, that what Captain Christensen terms "a light breeze" and "a moderate swell" is the usual conservative description of the wind and sea from the standpoint of one in his position, *after* the peril had passed. A helpless vessel in such a position as was the "General Hubbard" certainly was in distress.

The Difficulties Encountered in Making Port.

Continuing, Captain Christensen says (Apostles on Appeal pp. 28, 29):

> "The biggest difficulty was at Red Buoy No. 4, right opposite the south jetty; we laid there for about a half an hour, could not make an inch of headway as there was no flood tide; there was a heavy freshet in the river. My engines were working full speed ahead all the time. A strong tide was running out and it had the effect of setting the 'Hubbard' southward all the time, toward the south jetty; I was headed up to the northward; she was standing in the direction from me shaping south towards the jetty. It would not have taken but very little and she would have gone on the south jetty, and she would have taken me with her. I finally picked up speed, went through and proceeded up the river to Astoria, where I dropped anchor."

Witness Rodland states (Deposition, Apostles on Appeal p. 36) that there was a strong freshet running in the river and they had difficulty in getting in; that it took them a long time to get over the bar because the current was too strong.

Captain Watts of the "General Hubbard" gave his general opinion that there was no danger to either of the vessels in passing over the bar and into the channel of the river (Deposition, Apostles on Appeal pp. 85, 86), but admitted that they made very slow progress opposite the south jetty—about a mile and a half an hour—on account of the strong current in the channel. (Apostles on Appeal pp. 93, 94.) The suggestion is made by this wit-

ness that the captain of the "Avalon" should have anchored off the channel entrance and waited for a flood tide. We are not disposed to regard this suggestion seriously in the absence of any evidence showing that it was made in due season to the captain of the "Avalon". Also, if Captain Watts had requested that he be permitted to anchor outside, his request certainly would not have been denied. Furthermore, there is no evidence tending to show that it would have been safer to have entered on a flood tide rather than on an ebb tide. There is no such presumption, and, on the contrary, the ebb tide probably was the most favorable one under the circumstances. It is true that an ebb tide would increase the resistance of the water, but on the other hand a vessel is under better control in running against a current. Again, the flow of a flood tide against a strong current in a channel made by a freshet would produce tide rips and cause the vessel and its tow to sheer more than they actually did, and perhaps become unmanageable. There is nothing in fact to support the conclusion of Captain Watts that it was an error of judgment on the part of the "Avalon" to attempt the channel on an ebb tide; but, on the contrary, it would seem to have been advisable to risk having sufficient power to tow the "General Hubbard" and to make the channel while both vessels were under better control.

The keeper of the Coast Guard, O. S. Wickland, called for respondent, testified that when the ves-

sels were in sight of his station near the channel entrance the weather was clear at times with occasional rain squalls. (Apostles on Appeal p. 118.) That the current was running out when they came in, but he apparently was not certain whether there was a flood or ebb tide. (Apostles on Appeal, p. 120.) He disagrees with the other witnesses that the tow was made along the north shore of the channel and says that as far as he was able to make out they passed through mid-channel; that the "Avalon" did not appear to have any particular difficulty in making the tow and that in his opinion neither of the vessels were in any peril. (Apostles on Appeal p. 120.)

On cross-examination this witness admitted that there might have been a good deal of a freshet in the river, as there was always more or less freshet at that time of the year. That under such circumstances the tide runs out quite awhile after low tide (pp. 123, 124), and that it could be felt in a westerly direction to beyond the lightship (p. 125). It further appeared on cross examination that the jetty consisted of rock piling, but for a considerable distance from the end the piling had been shattered and what was left was mostly under water (pp. 126, 127). The witness says that in very heavy seas (and he might have added "in a swift current caused by a freshet and ebb tide") there would be danger of parting the hawser and that there would be danger of the towing vessel losing her propellor. That there would be danger of drifting out over the

bar, either to the north or the south side and on to Peacock Spit, but was unable to say what would have been the probable result in the present case. (pp. 127, 128.) In view of the fact that the wind was not from the north or northwest, which is the prevailing wind at that time of the year but, as Wickland testified, the weather was squally, the vessels would in all probability have been in greater danger of piling up on Peacock Spit than on the south jetty.

At the trial of the case in the court below there was an attempt upon the part of the claimants (appellee here) to lay great stress on the fact that there was no storm raging at the time of the rescue, or during the tow to Astoria. While it is true that no bad weather was encountered, still that is not the only element to be considered, and in no way should it have had the effect of reducing the award to the insignificant amount of two thousand dollars ($2000). That it is not only the clearly apparent danger that is considered, but also the undisclosed risks and numerous accidents which might happen to a vessel engaged in such an undertaking, has been well established by the decisions in numerous salvage cases.

In the case of *"The Great Northern"*, 72 Fed. 678, on page 682, it is said:

> "In services of this character a very considerable part of the danger and difficulty arises at the commencement of the service. Hawsers are not made fast between large vessels in the South Atlantic, even in fine weather,

without risk; and the mere maneuvering of the 'Hawkhurst' (the salving ship) and the commencing to get a strain upon the towing hawser was a service certainly attended with some danger."

Again on page 683:

"Fortunately for both ships, the weather and sea proved favorable after the towage was commenced. This last fact seems to be relied upon by the respondents as a reason for diminishing the amount which might otherwise be awarded to the salvors. Sufficient has been said to show that this principle does not hold good in admiralty. The good fortune of better weather and a quieter sea, which occurred during the course of the towing service, inured alike to both ships, and does not entitle the salved ship to claim the benefit of it, to the injury to the salving vessel."

We quote from *"The City of Puebla,"* 153 Fed. 925, on page 926 (opinion by Judge de Haven of this district):

"The wind had moderated, the sea was not rough, and the 'Puebla' was not in imminent danger at this time. The peril to which she was exposed was the probability of meeting with stormy weather, which at this season was very likely to occur, and which she was in no condition to withstand for any great length of time. Fortunately, such weather was not in fact encountered during the time the 'Puebla' was being towed into the port of San Francisco; but, if storms or adverse winds had been met, the service undertaken by the 'Chehalis' would have been rendered difficult, and in some degree dangerous. Indeed, it may be said to be a fact so well known as to be a matter of common knowledge among seafaring men that, in

towing a disabled vessel at sea great care is required, even under favorable conditions of weather, to guard against the dangers incident to such employment."

"The Daniel Steinman", 19 Fed. 918:

"I have considered also the risk incurred by the 'Republic'. It is true that the weather was fair and the sea smooth during the whole time that the 'Republic' had the 'Steinman' in tow; but it is also true that towing a disabled steamer of the size of the 'Steinman' by a steamer of the size of the 'Republic' is always attended with danger. In such a service care and watchfulness will not always prevent disaster. Says Sir Robert Phillimore, in deciding the case of *'The City of Chester*, 26 Mitch. Mar. Reg. 111:

'It is well known, and the Elder Brethren say, that in all these cases of large steamships rendering service to each other, there is very great danger, and they will require skillful navigation to avoid it.'"

A word more as to the amount of the award. It is not what *after* such a service has been completed the event shows as to the danger involved—it is the condition in which the salved vessel was at the time of the commencement of the salvage service. The "General Hubbard" was helpless and not even able to keep her head up to the sea. She had a deckload 16 feet in height and, lying as she was, with every swell rocking her from side to side, counsel for claimant can not fairly claim that she was in no danger. No one acquainted with the sea can fail to realize the danger of losing at least the deckload under these circumstances. The deck lash-

ings were undoubtedly intended to be strong enough to hold the deck cargo in place under ordinary conditions, but the danger of loss under the conditions here need only to be referred to in order to be appreciated. Had either owners or insurance companies (if she was insured—and she no doubt was) been in a position where they could have been consulted, is there any doubt but that their anxiety *then* over the safety of the vessel would have persuaded them to enter into an agreement to pay a fair compensation to insure the safety of the "General Hubbard" and her cargo? The court, we believe, must know something of the amounts charged by marine insurers as premiums for insuring vessels in the trade in which the "General Hubbard" was engaged. If we assume a value of approximately $425,000 for the steamer and her cargo, 2½% of that amount (and by specifying this percentage we do not intend the court to understand that it has any relation to the percentage charged by marine insurers) would amount to $10,625. This without any relation to the value of the "Avalon". Is it improper to suggest that had the owners of the property at risk, as the salved, and salving, been able to discuss the matter when the signals of distress were being given on the "General Hubbard", when she saw the "Avalon" proceeding on her course, and they had in mind the danger in which the "General Hubbard" then was, and would thereafter be, when going into the Columbia River, those interested in the "General Hubbard" and her cargo

would have been glad to offer at least 2½% of the values at stake, and been willing to pay even more?

Upon motion duly noticed and made by appellant in this court, to introduce new evidence as to the amount paid by appellent (libelant below) to the master and crew of the "Avalon" as consideration for the assignment to the appellant by said master and crew of their claim for compensation for salvage services performed to the "General Hubbard", this court made an order permitting a statement of the amount so paid to be included in this brief. The Steamer Avalon Company paid the crew one-half a month's wages. This totaled $885.

In view of the fact, therefore, that the sum of $885 was paid by the appellant to the master and crew of the "Avalon" as consideration for an assignment of their claims, and by so doing the appellant assumed the burden of the cost of the litigation, and in view of the value of the steamer and cargo salved, and that of the salving steamer, together with the earning power of the latter, and the damage which she was likely to sustain during the salvage service; and in further view of the danger consequent to the passing of hawsers from the "Avalon" to the "General Hubbard", and the towing of the "General Hubbard" into port; it is our contention that the award in the court below was, and is, entirely inadequate to the salvage service performed by the steamer "Avalon" and her master and crew. It is our further contention that the court below erred prejudicially to this appellant

by not taking the facts into proper consideration and in making the aforesaid inadequate award. We respectfully ask the reversal of the decree of the court below, and that such judgment be rendered herein as to this court shall seem proper.

Dated, San Francisco,
October 5, 1918.

Respectfully submitted,

IRA S. LILLICK,
Proctor for Appellant.

No. 3197

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

3

STEAMER AVALON COMPANY (a corporation),

Appellant,

vs.

HUBBARD STEAMSHIP COMPANY (a corporation), claimant of the American steamer "General Hubbard", her engines, boilers, machinery, tackle, apparel, furniture and cargo,

Appellee.

BRIEF FOR APPELLEE.

EDWARD J. MCCUTCHEN,
WARREN OLNEY, JR.,
CHARLES W. WILLARD,
Proctors for Appellee.

BERNARD WALSH PRINTING CO.

No. 3197

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

STEAMER AVALON COMPANY
(a corporation),
Appellant,

vs.

HUBBARD STEAMSHIP COMPANY (a corporation), claimant of the American steamer "General Hubbard", her engines, boilers, machinery, tackle, apparel, furniture and cargo,
Appellee.

BRIEF FOR APPELLEE.

Statement of the Case.

The steam schooner "General Hubbard" departed from the Columbia River on the evening of July 24, 1916, loaded with a cargo of lumber, bound for the port of San Pedro. About midnight of that day, and while approximately 14 miles from Cape Meares, in the usual course of coastwise vessels, her crank shaft broke, rendering her engines useless. Her master,

after consulting with the chief engineer, shot the usual rockets to attract the attention of the lighthouse keeper at Cape Meares, so that the latter might communicate with the mills of the owner of the vessel. A little later a vessel northbound without cargo was observed inshore. The master of the "General Hubbard" thereupon displayed his searchlight and again shot rockets to attract the attention of the passing vessel, which proved to be the "Avalon", owned by appellant.

The "Avalon" then came up to the "General Hubbard", and, on request of her master, and after an explanation of the condition of the vessel, agreed to tow her into the Columbia River. After passing the hawser to the "General Hubbard" by means of the usual heaving lines, and at about 2:25 a. m., both vessels proceeded to the desired destination where the "General Hubbard" anchored at about 8:20 p. m.

The night of the service was starlight, with a light breeze and a moderate northwest swell running. During the day the wind died down until it was absolutely calm. No seas of any kind were encountered during the entire time that the service was being performed, and none were to be reasonably anticipated because it was the fairest season of the year for that vicinity.

Thereafter, and on August 1, 1916, appellant libeled the "General Hubbard" in the court below to recover compensation for the salvage services alleged to have been performed by the "Avalon" and appellee was forced to file an admiralty stipulation for the release of the vessel in the sum of $20,000. Subsequently, and

on October 17, 1916, the master and crew of the "Avalon", acting by and through proctor for appellant, filed a second libel against appellee claiming compensation for salvage services performed by them as distinct from their vessel.

Prior to the time that the second libel was filed, the master and crew of the vessel had, for a valuable consideration, assigned all of their rights and claims for compensation to appellant.

Both libels were later consolidated for trial, and in handing down its opinion the learned court below directed that the libel of the master and crew be dismissed, holding and deciding that they, having assigned their rights to appellant, were not entitled to maintain their libel. The sum of $2000 and costs were awarded appellant on its libel, and it has prosecuted this appeal from that judgment. An appeal has not been taken by the master and crew of the "Avalon" and the decree of the District Court is, as to them, final.

THE CIRCUMSTANCES SURROUNDING THE COMMENCEMENT OF THE SERVICE.

The "General Hubbard", laden with 1,646,910 feet of lumber, valued at the mill at Astoria at $15,801.21 (Ap. 153), broke her crank shaft when approximately 14 miles northeast one quarter east from Cape Meares Lighthouse (Article IV of libel). After talking matters over with the chief engineer, Captain Watts, master of the "General Hubbard", decided to throw

up rockets to attract the lighthouse keeper at Cape Meares so that a steam tug could be sent out to him. He thought that they would know what steamer it was there at that time, and would telephone to the Hammond Lumber Company at Tongue Point (Astoria) and that they would send out a tug boat from Astoria (Ap. 80).

After sending off several rockets so as to attract the attention of the lighthouse keeper, he saw a steamer slightly inshore, which paid no attention to them, but after sending off more rockets and playing the searchlight, the steamer, which proved to be the "Avalon", turned around and came alongside the "General Hubbard" (Ap. 81) wherupon Captain Christensen says Captain Watts asked him to tow the "General Hubbard" to Astoria (Ap. 25).

The "Avalon" moved off a short distance and got her hawser ready and then started "to pick him up, to get him in tow". Captain Christensen went up alongside of the "General Hubbard" first and steamed up ahead a little bit and stopped her engines and gradually let his ship drop astern until the stem of the "Avalon" was within 30 or 40 feet of the bow of the "General Hubbard" (Ap. 27). A heaving line was then cast and the hawser hauled aboard of the "General Hubbard" and made fast. At 2:30 a. m. the "Avalon" straightened out on the line and proceeded to the Columbia River. There is no testimony that the hawser was passed and made fast under difficulties. The conditions of sea were such that the two vessels could be and were brought close together

for the passing of the hawser by means of a heaving line without the slightest risk of collision. Not a witness even suggested such peril and the libel itself makes no mention of it. Neither Captain Christensen nor Chief Engineer Rodland intimated any risk of the line fouling the wheel, and Captain Watts who was the only witness questioned regarding it, strenuously denied the possibility, except through possible carelessness on the "Avalon" (Ap. 101-2). No such danger is averred in the libel. The suggestion should be dismissed as without merit.

The Weather

What was the weather at that time? Captain Christensen says that it was a dark night, but that the stars were shining (Ap. 28); that *"there was a moderate swell running, northwest swell,"* and a light breeze (Ap. 26-7), and not, as the libel avers, "a heavy westerly swell". Captain Watts said the sea was very moderate, very quiet (Ap. 84), and First Officer Johnson, of the "General Hubbard", characterized it as a moderate sea and light swell (Ap. 42-44, 61-2). These opinions are substantially in accord, are uncontradicted and certainly establish the fact that the swell was moderate, the sea quiet and the wind light.

The weather report at North Head Station at the mouth of the Columbia River (respondent's exhibit A)* clearly demonstrates the favorable weather experienced during the whole time the services were being performed. The velocity of the wind during the whole

*On file herein as an original exhibit.

day of the 25th was not at any time greater than 20 miles. Manifestly, with such light wind the swell and sea would be, as the witnesses testified, moderate.

The Danger to the "General Hubbard".

And what of the alleged danger to the "General Hubbard"? We take Captain Christensen's own words:

> "Q. What danger was there to the 'Hubbard' before you got your hawser on her?
>
> A. *There was no danger except as I say, if a northwesterly gale of wind came up and she would drop her deckload and fill up with water; of course she was 14 miles from shore; and we must admit the fact that there was plenty of water to drift; she was 14 miles off shore.*
>
> Q. What effect if any would the swell have had upon her if it had increased in violence?
>
> * * * * * * *
>
> A. If she lost her deckload she might have filled up with water; *that is the only thing that would* have happened to her." (Ap. 34.)

Surely it cannot be urged in view of this testimony that the "General Hubbard" was in any danger of going ashore.

The only other danger suggested was that the "General Hubbard" *might* roll and lose her deckload. To do that she would have to break her stanchions (Ap. 36-7). But there was no evidence that she was in any danger of doing anything of the kind. There was not enough swell to make her roll (Ap. 44). Certainly the conditions then prevailing *were not such as to lead to any apprehension, for wind and* sea were most

moderate. Nor was any heavy swell to be anticipated in view of the season of the year.

The danger is to be judged by the conditions which actually prevail and those which may reasonably be anticipated. It is not to be judged by the possibility of extraordinary conditions neither actually occurring nor reasonably to be anticipated.

This does not mean that the service is necessarily to be determined in the light of subsequent events, but it does mean that it must be estimated by the facts which seem to surround it at the time. There must be something more than mere possibility in the supposed or suggested dangers. As said by Mr. Justice Story, in one of his learned admiralty decisions:

> "Salvage is a compensation for the rescue of the property from present, pressing, impending perils; *and not* for the rescue of it from *possible* future perils." (Italics ours.)
>
> *The Emulous,* F. C. 4480.

See, also,

> *The Young America,* 20 Fed. 926;
> *The Lowther Castle,* 195 Fed. 604.

The accident occurred on the 25th day of July, in the middle of summer, *when the fairest kind of weather prevails on the Oregon coast.* There was no ground, then, for any apprehension of any danger from violent weather, for even the possibility of such contention was destroyed by the testimony of First Officer Johnson, who had 16 years' experience on this coast and who was submitted to a serious cross-examination on

the subject. Storms are not to be reasonably expected at that season of the year (Ap. 50-51, 53). There was no other evidence offered. Appellant did not take the trouble even to question Captain Christensen about it.

It is pertinent to note that there is no entry in the log book of either vessel tending to show the existence of any danger. Furthermore, the volume of traffic up and down the coast is common knowledge, and the "General Hubbard" was in the usual course of coastwise vessels. In fact the record shows that other vessels were in the vicinity at the time. Mr. Johnson saw two other steamers southbound (Ap. 59), and Mr. Rodland saw another vessel inshore from them while they were putting the hawser aboard the "General Hubbard" (Ap. 37). Captain Christensen also saw a vessel inshore of him (Ap. 34). She was also within sight of Cape Meares Lighthouse and not far distant from the entrance to the Columbia River, where two seagoing tugs are maintained (Ap. 105), one of which the "Oneonta", subsequently towed her in her disabled condition from the Columbia River to San Pedro. Thus towage and other assistance was readily available, *"which is a circumstance proper to be considered in determining the question of compensation to be allowed libelants"*.

The Jessomene, 47 Fed. 903,

or as stated by Judge Morrow in

The Monticello, 81 Fed. 211-14,

> "The effect of this proof is, of course, to reduce the merit of the services rendered by the San Benito. It is always considered by courts of

admiralty an important element in fixing the compensation to be awarded."

See, also,

35 Cyc., 755.

The Towage to the Columbia River.

The towage to the Columbia River was without incident. Captain Watts testified that the weather moderated; in fact died down to a calm (Ap. 83). First Officer Johnson said that they had fine weather all the way; clear sky and light wind, northwest, a little swell, nothing to speak of, and not enough to stop them, or to make any disturbance, or roll the ship (Ap. 45-47).

Captain Christensen makes no reference in his testimony to any incident or condition of danger on the voyage. No entry pertaining to it appears in the "Avalon's" log book, save "Lt. (light) westerly wind, clear weather, northwesterly swell" (Ap. 33). Even the libel contains no averment as to danger of collision, or capsizing, or getting the line in the wheel or yawing strains, and from a glance at its exaggerated averments it is safe to venture the statement that the charges would have been made if there had been the semblance of their existence.

Captain Christensen testified on direct examination that the biggest difficulty was at red buoy No. 4 right opposite the south jetty; that they laid there for about half an hour; could not make an inch of headway as there was no flood tide; that there was a heavy freshet in the river (Ap. 28). As to the danger he said that it

would have taken very little to have put the "General Hubbard" on the south jetty and to have taken the "Avalon" with her (Ap. 29).

All that Chief Engineer Rodland had to say on the subject was that there was a strong freshet running, and that it took them quite a time getting over the bar because the current was too strong (Ap. 36). He says not a word about being stopped for half an hour or about any danger of being set toward the south jetty. If it had been the fact that the "Avalon" was stopped or in danger of being carried on to the south jetty, is it not reasonable to suppose that the chief engineer would have been asked by appellant about it? He was questioned about the situation of the "General Hubbard" when she was taken in tow. Or would not the log book have contained some reference to it?

Opposed to this at least very dubious testimony of the master and engineer of the "Avalon" is the testimony of the lighthouse keeper, and the master and chief officer of the "General Hubbard".

Appellant, in face of the foregoing facts, apparently realizes the improbability of this court accepting the testimony of Captain Christensen on this question. It does not in this court urge the danger to which Captain Christensen testifies. It urges instead that the danger was of the vessel's piling up on Peacock Spit, a danger as to which there is no testimony whatever and which was not urged in the lower court.

The court will note that neither the master nor the chief engineer of the "Avalon" made any suggestion

that by reason of the strong currents (or any other reason) "the said vessels were laboring heavily,"* as the libel avers. The allegation is simply without any support in the evidence.

Captain Watts said that at the time the vessel crossed the bar into the river the bar was perfectly smooth (Ap. 86, 100). Chief Officer Johnson described it as smooth, "no swell on at all" (Ap. 47) and neither Christensen nor Chief Engineer Rodland made any reference to any swell or sea on the bar in speaking of the difficulties claimed to have been encountered. Captain Wickland called it a "moderate sea" (Ap. 121). It is perfectly apparent that the bar was moderate and presented no unfavorable or dangerous conditions.

In addition to the fact that the vessels passed over the bar without difficulty or incident (the only conclusion that can be fairly drawn from the evidence) there is also the fact that immediately outside the bar there was good anchorage where if there had been the slightest danger to the vessels grounding in the then current, they could have anchored safely and waited for a flood tide (Ap. 47-105).

We respectfully submit that the facts demonstrate conclusively that the services to the "General Hubbard" were, as the court below found them to be,

*Captain Wickland, in answer to a question of appellant's proctor on this subject said:

> "A. I have to try to explain that to you, Mr. Spittle. When we came alongside of the vessel she was not very far from No. 4 buoy, that is considered one of the worst places in going out there under ordinary conditions, and she was not laboring heavier than when we went alongside and took a letter from the captain of the 'General Hubbard', you may imagine how she labored. We went alongside with a power boat and they lowered the letter."

unattended with any danger whatsoever to either vessel, and that they were, in fact, but towage of the most ordinary kind, rendered to a disabled vessel, and hence on that account entitled to be classed as salvage services, but of a low order which does not rise to the dignity of salvage in the true sense.

The findings of the lower court, being supported by the evidence, will not, under the settled rule of this court, be disturbed.

Alaska Packers' Ass'n v. Domenico et al, 117 Fed. 99;

Peterson et al. v. Larsen, 177 Fed. 44;

The Bailey Gatzert, 179 Fed. 617;

The Hardy, 229 Fed. 985;

San Francisco & Portland Steamship Company v. Leggett Steamship Company, (decided by this court October 7, 1918).

THE VALUES INVOLVED.

The appellant realizes the weakness of its case upon the important elements usually considered by admiralty courts in making salvage awards.

The most important elements—danger and peril—have for obvious reasons, received little attention in its brief. The brief dwells at length on the asserted values involved as if that element were the all-controlling one in arriving at the correct amount. Indeed it passes over the real facts of the case and contends that the character and value of the property at

risk is the question of prime importance. This contention is not supported by the authorities.

The values involved should, of course, receive consideration, but in such a case as the present one, we submit that the question of value is of secondary importance. As said by the Circuit Court of Appeals for the Fifth Circuit, in

> *Compagnie Commerciale De Transport a Vapeur Francaise, et al. v. Charente Steamship Co., Limited et al.,* 60 Fed. 921-4,
>
> "The exact value of the property saved, where large, is but a minor element in computing salvage, * * *."

The courts have frequently enunciated the same principle as will appear from the decisions, a few of which we cite.

In

> *The Philah*, F. C. 11091a,

the court said:

> "However great the value, the salvage is to be simply an adequate remuneration."

The language of the court in

> *The George Gilchrist,* F. C. 5333,

is quite applicable to the facts of this case. It said:

> "This is one of those cases in which a disabled vessel is opportunely and successfully taken in tow, but in such a place, that she might count with pretty strong hope on other assistance in default of that of the actual salvor. In such a case the need of succor is not so urgent as to make the amount saved the most important element of the salvage service,"

In

The Baker, 25 Fed. 771-4,

the Circuit Court said:

> "Neither the value of the property imperilled nor the exact quantum of service performed is a controlling consideration in determining the compensation to be made."

The syllabi in the two following decisions correctly set forth the views of the court:

In

Bowley v. Goddard, F. C. 1736,

the syllabus reads:

> "The value saved is not a very important element in awarding a salvage when the danger *is not immediate,* and the situation of the saved vessel is such that *other assistance* might probably have been rendered if that of the actual salvors had not been accepted."

In

The Carroll, 167 Fed. 112,

the following appears in the syllabus:

> "Where a salvage service rendered by a tug was in the nature of a towage, and the danger was not certain and extreme, an allowance of a lump sum as compensation, bearing some relation to the cost of the service if rendered under a contract, is fairer than a percentage of the value of the salved property."

The same doctrine is announced in

Hughes on Admiralty, page 139,

as follows:

> "In an ordinary case of towage salvage, for instance, its award for saving $500,000 would not greatly differ from its award for saving $300,000."

The authors of *Cyc.* say:

> "The exact value of property saved, where large, is but a minor element in computing salvage."
>
> *35 Cyc.*, 754.

It is apparent, therefore, that the principle is sound and of universal application. In every case where the values involved are large and the services are attended without exposure to any particular danger, a very small percentage might amount to an excessive allowance. It is this controlling principle that has led the courts to say that a salvage service which hardly exceeds an ordinary towage is naturally remunerated on a very different scale from an heroic rescue from imminent destruction.

The law of the admiralty does not contain any scale by which the amount earned by salvors may be determined. This much, however, is clear. Where the salvage is not attended by any risk or peril and consists merely in picking up the disabled vessel in a calm sea and good weather, and towing her into port without danger or incident, the service performed differs little in character from that of towage and goes but little beyond it. The award undoubtedly, even in such a case (which is that presented here) should go beyond that of merely reasonable compensation for a towage service, this because of the policy of encouraging and rewarding salvors. But the award should not go far beyond this and should bear relation to what would be reason-

able compensation only for services rendered, for the reason that the elements for which reward is given, those of risk and peril, are not present. The award in this case in view of all the circumstances was adequate.

Counsel makes much of what he assumes or supposes the owners of the vessel would have been willing to pay for the supposed rescue. There are two replies to this:

First. It would make the assumed necessities of the owners the measure of the award to which the salvor is entitled. This is not the law and it is wholly contrary to the policy of the law. Time and again contracts for salvage exacted from the master of a disabled vessel, because of the dire necessity of his vessel, have been abrogated and set aside.

Second. There was no such necessity in this case as appellant's counsel assumes. No one had any fear of the safety of the "General Hubbard". Her master expected to communicate with the lighthouse keeper who would have caused a tug to be dispatched. Two tugs are maintained at the mouth of the river by the Port of Portland (Ap. 105), either of which was capable of towing the "General Hubbard". One of them, as has been pointed out, later towed the vessel to San Pedro. The owner of the vessel also had its mill at Tongue Point on the Columbia River, where tugs could have been obtained, and the master of the vessel, if ready assistance was not available, and he could not attract the attention of the lighthouse keeper, expected to send his boat to Cape Meares to arrange for a tug (Ap. 103-4). No one can tell what the owners of the

"General Hubbard" would have agreed to pay if they had been aware of the situation and it had come to making a bargain for her being brought back to port. Certain it is, however, that they would not have agreed to much more than the cost of sending a tug out to get her and tow her in.

The Value of the "General Hubbard."

As for the value of the "General Hubbard", we submit that the judgment of Captain Pillsbury should be taken as a fair one. He was called upon by the owners and underwriters to make an appraisement—not for insurance purposes, as appellant states (brief p. 9), but for general average purposes (Ap. 182-9), so that the general average adjusters would be able to apportion the cost of the salvage service between the shipowner and its underwriters. The court knows, as a matter of law, that general average liabilities are independent of any principle of marine insurance and are apportioned on the basis of actual values of the properties involved. The matter of marine insurance comes in only as shipowner or cargo owner may be wholly or partially insured against it. Manifestly, Captain Pillsbury was not placing any fictitious valuation on the "General Hubbard" for insurance purposes, and from his statements as to the factors which entered into his calculations, it is manifest that he endeavored to place a fair valuation upon the ship at a time when the value of vessels was fluctuating as never before in maritime history.

The fact that the "General Hubbard" sold two or three months later for $463,125 is no evidence of what

her actual value was at Astoria on July 25, 1916. The times were too speculative to justify the acceptance of that price as a basis of value in July.

It may be that Captain Pillsbury was conservative. In a time of fevered speculations in shipping and hugely mounting values, a conservative judgment is the only safe and reliable judgment. On the other hand it is to be noted that when he placed an off-hand valuaton on the "Avalon" it was $25,000 higher than the value appellant pleaded by an amendment made in open court during the morning session. This incident is some indication of how speculative were men's minds on the subject of ship values.

In the absence of better proof, we respectfully submit that the value fixed by Captain Pillsbury is the correct one.

The court will note that in the original libel, appellant alleged that the value of the "General Hubbard" was $300,000 and the "Avalon" $125,000. On the day of trial, it amended the former to $465,000 and the latter to $200,000. In explanation of the change of allegation as to the "Avalon's" value, Mr. Wood explained that he told Mr. Olson that he did not want to put in any inflated values on any of their ships, and that they would put it in at just exactly what she cost them. But he did not assign any such reason for alleging the value of the "General Hubbard" to be $300,000. In fact, he could not, for the cost complete five years before was $209,329.66 (Ap. 197). It is a fair inference that when Mr. Wood verified the libel, he considered the

value of the "General Hubbard' to be just what the libel stated, $300,000.

The Cargo.

If the value of the cargo should enter into consideration at all, on the theory of salvage, it can do so only on the basis of its value at Astoria, namely, $15,801.21, for salvage is based on values at the place where the salvage services are terminated, not at the port to which the cargo may be subsequently taken. It was not of the value of $25,000 as stated on page 7 of appellant's brief.

The Freight.

Freight on the cargo ultimately delivered at San Pedro amounted to $9,881.46. But on the authority of the decision of this court in

Perriam v. Pacific Coast Co., 133 Fed. 140,

it cannot be taken into consideration even on the basis of salvage, for the "General Hubbard" had but commenced her voyage, and was returned to the port of her departure. No freight was saved.

The Value of the "Avalon."

The value originally fixed in the libel for the "Avalon" was $125,000. In support of the amendment, made on the trial, increasing the alleged valuation to $200,000, Mr. Wood said that they put it in at cost because they didn't want to put in any inflated values on their ships. Can we be criticized, therefore, for inferring from that statement that the witness must have considered that

they were putting in an inflated value when they jumped it to $200,000?

They fixed upon the valuation of the "Avalon" by comparison with an offer of $225,000 for the "Solano". But the "Avalon" was two years older, carried 100,000 feet less cargo, was smaller by 125 tons, and only had a horse-power of 575 according to the master (Ap. 34) and 625 according to the engineer (Ap. 36). As a matter of fact the official registers give her horse-power at 550. It is selfevident that the "Avalon" was not the ship that the "Solano" was.

We submit that the best evidence of the value of the "Avalon" was the prices for which the "Rosalie Mahony" and "Mary Olson" were sold about the middle of 1916, namely, $160,000 (Ap. 159). They were about the same size as the "Avalon" (Ap. 157) and sold in a special market to meet the demands of a particular trade (Ap. 161). While Mr. Parr, who told of the sales, stated that those vessels were not in as good condition as the "Avalon" on account of having carried mahogany logs on the Atlantic, it developed that this was hearsay, and the fact is that both the "Rosalie Mahony" and "Mary Olson" are one year younger than the "Avalon".

The authorities cited by appellant's proctor have no application to the case at bar. The award in a salvage case depends most largely on the risk and peril involved. These elements are not present here. They were present in every case cited by appellant's proctor.

Thus, in the case of

The Gallego, 30 Fed. 271,

the steamer had drifted helplessly for two days over 100 miles off the Florida coast, and would, as the court expressly found, have drifted ashore on a dangerous reef. She had been refused assistance by passing vessels, and was in a position of great peril. The service performed by the salving vessel occupied five days, during which a heavy gale was encountered. She was actually delayed eight days, during the whole of which time she was subjected to all of the usual marine risks. During the time the service was performed, the vessels were actually in collision, with resulting damage to the salving vessel, and nine inch hawsers, in the heavy weather encountered, parted three times. Upon the facts of that case, the court very properly said that it was one in which a liberal award should be made.

In

The Italia, 42 Fed. 416,

a large vessel with *220 passengers* on board, broke down 750 miles out from New York, to which port she was towed, while laboring in a heavy sea. Stormy weather was encountered—in fact a succession of gales swept over the course of the vessels. The salving vessel, too, had on board 461 passengers, and the service occupied four days. The court expressly found that the service was an important one, and that the disabled vessel was released from a perilous position.

In

The Charles Wetmore, 51 Fed. 449,

the service was performed in the middle of winter when

strong and rough seas were to be expected, and were actually encountered. The salving vessel, at the time she saw the disabled vessel, was in a place of refuge into which she had put on account of the boisterous weather that was prevailing. This safe place she voluntarily gave up and proceeded to the assistance of the disabled vessel. The court also found that "The 'Wetmore' was rescued from a position of great danger when the 'Zambesi' took hold of her near Tillamook Rock".

In

The Chatfield, 52 Fed. 479,

the rescued vessel broke down in the Atlantic off Cape Henry in the winter season at a time when very strong winds were blowing which increased to a gale. In fact the court said that the place where the service was rendered is "proverbially dangerous in the pendency of heavy winds".

The court also said:

> "On the coast between Cape Henry and Charleston the difficulty and danger of salvage services are exceptionally great, requiring more liberal awards for those which prove successful than services rendered in other safer waters, on other and safer coasts."

In this case, after the hawsers parted three times in the heavy seas, the "Brigham" steamed around the disabled vessel all night and was actually in collision with her, causing considerable damage. Realizing that she could not be of further assistance to the disabled vessel in the weather prevailing, she steamed after other

assistance, but, before the assistance arrived, the "City of Augusta", a large passenger vessel, took the "Chatfield" in tow, and towed her into Hampton Roads. The City of Augusta encountered gales and was also in collision with the disabled vessel. Furthermore, it appears that at the time she came up to the "Chatfield" the latter was dragging her anchors and drifting upon the beach, and would have brought up there within eight hours.

A glance at the facts of the case of

The Sun, reported in 161 Fed. 385,

will at once point out the distinguishing elements between that case and the present one. There the disabled vessel had drifted from February 18th to March 2nd, on the Atlantic coast in the middle of winter. The salving vessel was in attendance four days on account of the service and actually lost six days' time.

The facts in the case of

The Sahara, 246 Fed. 141,

were that in a dense fog, the "Sahara" stranded on a reef off the coast of Virginia. This coast is exceedingly dangerous and her rescue was effected by a powerful tug there kept ready for just such emergencies. The court very properly said that public interests require the maintenance of such vessels, and, in order that they may be maintained, it is necessary that they be liberally compensated when they perform a successful and dangerous salvage service.

THE DISCRETION OF THE TRIAL COURT.

We submit that under no possible view can it be held that the award in this case is so inadequate as to amount to or be an *abuse of discretion* on the part of the trial court. To us the award seems adequate. We have no doubt that to appellant's proctor it genuinely seems inadequate. To the appellate court, it might or it might not seem adequate if the court were to look at the matter as one of first impression. The point is that it makes no difference. The case is not to be looked at as one of first impression. It is an appeal from a decision of the trial court on a matter peculiarly left to its discretion. It is not enough that the appellate court should feel that possibly, or probably or even certainly, it would have made a larger award if it had been sitting in the place of the trial court, and its discretion substituted for that of the trial court. Its discretion is not to be substituted. It must appear not merely that there is a difference of judgment, but that the judgment of the trial court is without reason, is an abuse of the discretion entrusted to it.

This rule in regard to salvage awards is thoroughly well established.

Thus in

The Florence, 71 Fed. 527,

the Circuit Court of Appeals for the Second Circuit said:

> "We should have been better satisfied with a somewhat larger award in this case than was allowed by the court below, but cannot find that it was so manifestly inadequate as to justify its revision by an appellate court. It did not proceed

upon wrong principle or any misapprehension of the facts, and different minds could reasonably reach a different conclusion upon the matter. We cannot interfere with it without violating the salutary rule not to change the decree of the court below in salvage causes unless there is an exceedingly strong case made out of abuse or palpable mistake in the exercise of its discretion."

This court in

Simpson v. Dollar, 109 Fed. 814,

enunciated the same rule as follows:

"In the light of many of the precedents, the amount awarded seems low. We cannot say, however, that it is manifestly inadequate, or that the district court has adopted any erroneous principle in arriving at his conclusion. No exact criterion can be found for estimating the amount of salvage in any case. The judgments of courts must necessarily differ as to the precise amount to be allowed under given circumstances. Where there has been no mistake in fact, or application of an unwarranted rule of compensation in arriving at the award, and the amount allowed cannot be clearly seen to be inappropriate, the courts on appeal have been reluctant to disturb the decision of the trial court. The Bay of Naples, 1 C. C. A. 81; 48 Fed. 737; The Amity, 16 C. C. A. 170; 69 Fed. 110; The George W. Clyde, 30 C. C. A. 292; 86 Fed. 665; The Trefusis, 39 C. C. A. 96; 98 Fed. 314; The Emulous, 1 Summ. 214, Fed. Cas. No. 4480."

For other similar statements of the rule, see:

The Emulous, F. C. 4480;

Hume v. J. D. Spreckels & Bros. Co., 115 Fed. 51 (9th Circuit);

Perriam v. Pacific Coast Co., 133 Fed. 140 (9th Circuit);

The Roanoke, 214 Fed. 63 (9th Circuit);
The Sybil, 4 Wheat. 98; 4 L. Ed. 522;
The Connemara, 118 U. S. 352; 27 L. ed. 751;
The Hesper, 123 U. S. 256; 30 L. ed. 1175;
The Carrier Dove, 2 Moore P. C. (N. S.) 254;
The Clarisse, 12 Moore P. C. 340; 14 Eng. Reprints 940.

We submit that under no circumstances can it be justly said the award of the trial court amounted to an abuse of discretion. If this be true, it is an end of the matter.

THE SALVAGE CLAIM OF THE MASTER AND CREW OF THE VESSEL.

Two libels were presented below, one by the owner of the "Avalon" and one by the master and crew. These were tried together and the claim of the master and crew was dismissed and an award rendered in favor of the owner of the vessel only. No appeal was taken from the dismissal of the libel by the master and crew for reasons which a statement of the matter will make apparent and this claim is not directly before the court. The facts in connection with it, however, appear in the record and are of such a character that they may well be taken into consideration in a determination of the appeal on the owner's claim. It is well established that the conduct of the salvor may be considered in determining the amount to be allowed. For instance in

The Ragnarok, 158 Fed. 694,

the court said:

> "It is undoubtedly true, that where a libelant shows such unconscionable greed and such inaccurate or false claims as to throw doubt upon the entire matter, such conduct may resolve a doubtful case in favor of the claimant, render it impossible to place credence in the story of the libelant, or even be a basis for holding that no compensation should be allowed for whatever services were rendered."

Marvin, in his work on *Wreck and Salvage,* at page 226, says:

> "A court of admiralty is to the extent of its jurisdiction, at least in cases of this sort, a court of equity; and the same rule applies here, as in other courts of equity; that the party who asks aid, must come with clean hands."

And on page 233:

> "Good faith and fairness are required of salvors in the manner of settling the salvage."

See, also:

The Aurora, F. C. 659;
The Byron, F. C. 2275;
The Mount Washington, F. C. 9887;
The Young America, 20 Fed. 926;
The Cherokee, 31 Fed. 167;
The Bremen, 111 Fed. 228;
The Banes, 147 Fed. 192.

The "General Hubbard" was towed into the Columbia River on July 25, 1916. Six days later, on August 1st, the libel by the owner was filed. Eleven days after the salvage, on August 5th, the owner took from the master and crew an absolute and full ~~satisfaction~~ assignment of

all their claims for salvage, paying therefor to the master and each of the crew a half month's wages, aggregating a total of $885 (Ap. 195).

At the same time the owner took from the master and crew another and very different document (Ap. 172) wherein and whereby ostensibly the master and crew placed their claim in the hands of the owner for collection by suit or settlement and the owner agreed on its part to use its best efforts to collect as large an award as possible *and distribute it equitably among the officers and crew.*

In view of the fact that the officers and crew had absolutely parted with their claim to the owner, this second document could have been executed only for the purpose of concealment and to obtain for the pecuniary benefit of the owner whatever sympathy or consideration might possibly exist, perhaps not unnaturally, in the mind of the court for a claim by the officers and crew as distinguished from a claim by the owner.

Nor is this all. On October 17, 1916, a libel was filed in the name of the officers and crew. In answering this libel the appellee propounded certain interrogatories designed to discover whether or not the ostensible libelants had parted with their claim. In response to these interrogatories, the second document of August 5, 1916 —what we may justly term the camouflage document— was exhibited, but not the real assignment, nor was any reference to it made. It was not until the actual trial of the case and then only after persistent efforts by appellee's proctor that its existence was admitted and it was produced (Ap. 165-178, 195). Up to this time

the libel in the name of the officers and crew of the "Avalon" was ostensibly being prosecuted for their benefit.

The foregoing facts speak for themselves. They need no comment by us. In connection with them and as throwing light on the character of the libel here involved, we would ask the court to read the allegations of the libel itself (Ap. 5) and contrast them with the actual facts as disclosed by the testimony. In our experience we have known in no salvage case of such exaggerated and unsupported claims.

We do not know whether or not this conduct and the making of these exaggerated and unsupported claims influenced the trial court in fixing its award. We believe, however, that this court may now properly consider them in determining whether the lower court abused its discretion. This might not be true in any but a salvage case. But in a salvage case, the award is in considerable part in the nature of a reward over and above compensation merely, and in determining the award the meritorious or unmeritorious conduct and claims of the salvor are elements to be considered.

Dated, San Francisco,
October 25, 1918.

Respectfully submitted,

EDWARD J. MCCUTCHEN,
WARREN OLNEY, JR.,
CHARLES W. WILLARD,
Proctors for Appellee.

No. 3198

IN

The United States Circuit Court of Appeals

For the Ninth Circuit

THE CITY OF SALEM, a municipal corporation, WALTER E. KEYES, its Mayor, and C. O. RICE its Treasurer,

Plaintiffs in Error,

vs.

SALEM WATER, LIGHT & POWER COMPANY, a corporation,

Defendant in Error.

Transcript of Record

Upon Writ of Error to the District Court of the United States for the District of Oregon

N. D. ELLIOTT, PRINTER, SALEM, ORE.

ERRATA

Page 32, line 13, last word "and" should be "any."

Page 34, line 10, "so amend" should be "to amend."

Page 40, line 10, "section 1" should be "section 1a."

Page 65, line 1, paragraph 1, words "equitable and ratable" should be "equitably and ratably."

Page 68, 6th line from the bottom the word "contact" should be "contract."

Page 72, 5th line from bottom the word "application" should be "applicable."

Page 76, under exhibit C, headings of columns have been omitted. They should be as follows: year, month, number of hydrants, amount.

IN THE

United States Circuit Court of Appeals

for the Ninth Circuit

THE CITY OF SALEM, a municipal corporation, WALTER E. KEYES, its Mayor, and C. O. RICE, its Treasurer,

Plaintiffs in Error

vs.

SALEM WATER, LIGHT & POWER COMPANY, a corporation,

Defendant in Error.

NAMES AND ADDRESSES OF THE ATTORNEYS OF RECORD

Wood, Montague, Hunt & Cookingham,
Yeon Building, Portland, Oregon, for the
Defendant in Error.

B. W. Macy, Salem, Oregon,
Wm. P. Lord, Lewis Bldg., Portland, Oregon,
for the Plaintiffs in Error.

INDEX

CITATION ON WRIT OF ERROR

United States of America,
District of Oregon,—ss.

To Salem Water, Light and Power Company, a corporation, Wood, Montague & Hunt, Your Attorneys of Record,
Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the District of Oregon, wherein The City of Salem, a municipal corporation, Walter E. Keyes, its Mayor, and C. O. Rice, its Treasurer, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgement in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District, this 22nd day of May in the year of our Lord, one thousand, nine hundred and eighteen.

CHAS. E. WOLVERTON,
Judge.

Service accepted
May 22nd, 1918.

M. M. MATTHIESSEN,
of Attorneys for Plaintiff.

Filed May 22nd, 1918. G. H. Marsh, Clerk.

WRIT OF ERROR

In the United States Circuit Court of Appeals for the Ninth Circuit

The City of Salem, a municipal corporation, Walter E. Keyes, its Mayor, and C. O. Rice, its Treasurer,

Plaintiffs in Error,

vs. Writ of Error.

Salem Water, Light & Power Company, a corporation,

Defendant in Error.

THE UNITED STATES OF AMERICA,—ss.

THE PRESIDENT OF THE UNITED STATES OF AMERICA.

To the Judge of the District Court of the United States for the District of Oregon:

Greeting:

Because in the records and proceedings, as also in the rendition of the judgement of a plea which is in the District Court before the Honorable Robert S. Bean, one of you, between Salem Water, Light & Power Company, a corporation, Plaintiff and Defendant in Error, and The City of Salem, a municipal corporation, Walter E. Keyes, its Mayor and C. O. Rice, its Treasurer, Defendants and Plaintiffs in Error, a manifest error hath happened to the great damage of the said Plaintiffs in Error, as by complaint doth appear; and we, being willing that error, if any hath been, should be duly corrected, and full and speedy

justice done to the parties aforsaid, and, in this behalf, do command you, if judgement be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforsaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforsaid, being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

WITNESS the HONORABLE EDWARD DOUGLAS WHITE,
Chief Justice of the Supreme Court of the United States this 22nd day of May, 1918.

(Seal)

G. H. MARSH,
Clerk of the District Court of the United States for the District of Oregon.

The foregoing Writ of Error was served on the District Court of the United States for the District of Oregon by depositing with me as the Clerk of said

Treasurer of the City of Salem, Oregon, the municipal corporation above named.

III.

That the Public Service Commission of the State of Oregon is a commission duly organized, created and existing by act of the Legislature of the State of Oregon which is known as Chapter 279 of the Session Laws of 1911, and entitled, "An Act to define public utilities, "and to provide for their regulation in this state, and "for that purpose to confer upon the Railroad Com- "mission of Oregon power and jurisdiction to super- "vise and regulate such public utilities, and providing "the manner in which the power and jurisdiction of "such commission shall be exercised, prescribing pen- "alties for the violation of the provisions of this Act, "and the procedure and rules of evidence in relation "thereto, making an appropriation to carry out the "provisions hereof, amending Section 2 of Chapter 53 "of the Laws of Oregon for the year 1907, the same "being Section 6876 of Lord's Oregon Laws, and de- "claring an emergency", together with all acts amendatory thereof and supplemental thereto.

IV.

That heretofore The Salem Water Company, a corporation organized and existing under and by virtue of the laws of the State of Oregon was organized for the purpose, among other things, of supplying water to the inhabitants and residents of the City of Salem, Oregon, and for such other public purposes as could be

rightfully and lawfully given to it. That heretofore and on or about April 16, 1891, the City of Salem, then being a municipal corporation and empowred so to do, did enact an ordinance known as Ordinance No. 207, wherein and whereby The Salem Water Company, an Oregon corporation, was given the right, privilege and franchise to lay down pipes in the streets and alleys of said city, and to excavate streets and alleys for that purpose, and to supply the citizens and inhabitants of the City of Salem, Oregon, with water. That said Ordinance No. 207 was entitled, "An Ordinance providing for the laying down of pipes for water in the "streets and alleys of the City of Salem, by The Salem "Water Company". That said rights and privileges aforsaid were given to the said Salem Water Company, its successors and assigns, by said Ordinance No. 207. That said Ordinance No. 207 was amended by the Council of the City of Salem on the 18th day of April, 1898, by an Ordinance known as Ordinance No. 346, the same being an ordinance to amend Section 1 of an ordinance entitled "An Ordinance providing for the "laying down of pipes for water in the streets and al- "leys of the City of Salem, by the Salem Water Com- "pany". That the said Salem Water Company was given further franchises, rights and privileges by the City of Salem by ordinance of the City Council duly enacted, which ordinance was known as No. 368 and was entitled, 'An Ordinance authorizing and permit- "ting The Salem Water Company to construct and "maintain a flume across Liberty Street of the City of "Salem, between blocks numbered eighteen and thirty-

"six in said City", and that The Salem Water Company and its successors, the Salem Water, Light & Power Company, now hold said rights, privileges and franchises by virtue of said Ordinance No. 207 aforesaid, No. 346 aforesaid, and No. 368 aforesaid, and all ordinances and acts amendatory thereof and supplemental thereto. That heretofore The Salem Water Company, an Oregon corporation, for a valuable consideration, transferred, set over and assigned unto this plaintiff, the Salem Water, Light & Power Company, a corporation of Arizona, all the of its right, title and interest in and to said franchisees, rights and privileges so granted to said Salem Water Company by said Ordinances No. 207, No. 346 and No. 368, and the acts supplemental thereto and amendatory thereof, and did further transfer, assign and set over unto the Salem Water, Light & Power Company all of its property, real, personal and mixed, including all franchises, rights and privileges, and the said Salem Water, Light & Power Company, plaintiff above named, is now the owner thereof.

V.

That in and by section 4 of Ordinance No. 207, as enacted by the City Council of the City of Salem aforesaid, it was provided:

> "The said Salem Water Company, their "successors or assigns, shall not charge, at any "time, higher rates for water than is custo- "marily allowed for water in towns or cities "of like population on the Pacific Coast but

"The Salem Water Company, its successors "or assigns, shall not at any time charge more "than one dollar and eighty-two cents ($1.82) "per month for each hydrant or cistern act- "ually supplied. And the right is hereby re- "served by the City of Salem to continue or "discontinue, to connect or disconnect any or "all hydrants or cisterns connected, or which "may hereafter be connected, with said works; "and the City of Salem shall not pay for said "hydrants or cisterns, while the same are dis- "connected or discontinued."

VI.

That heretofore and on or about the 20th day of May, 1913, the City of Salem, a municipal corporation, of the State of Oregon, did file a complaint with the Public Service Commission of the State of Oregon, then known as the Railroad Commission of the State of Oregon, entitled as follows: "Before the Railroad "Commission of the State of Oregon. The City of "Salem, a municipal corporation, plaintiff, vs. Salem "Water, Light & Power Co., a corporation, defendant, "No. U. F. ———, Complaint", wherein and whereby the said City of Salem did set forth that the plaintiff was at the times therein mentioned a municipal corporation organized and existing under and by virtue of the laws of the State of Oregon and located in the County of Marion, in said state, and that the said defendant therein named, to-wit, the Salem Water, Light & Power Company, a corporation, was a corporation organized and existing under and by virtue of the laws of the State of Arizona, and is a public utility engaged in the business of supplying water to the inhabitants

of the plaintiff municipal corporation, and as a part of said business owns, operates and controls a water works pumping plant, water mains, reservoirs, pumps and other equipment and apparatus used in connection therewith. That said Salem Water, Light & Power Company, as a public utility, is subject to the provisions of Chapter 279 of the laws of Oregon for the year 1911. The said complaint before the Railroad Commission of the State of Oregon further set forth that the distributing system of the Salem Water, Light & Power Company was inadequate to supply the demands of the residents and citizens of the City of Salem, and that said water supply was inadequate, both for domestic use and fire protection, and that the rates so charged by said Salem Water, Light & Power Company were unequal, wherein said complaint the said City of Salem did conclude with a prayer as follows:

> "WHEREFORE, plaintiff prays your "Commission to make such necessary orders "for the extension of the distributing mains of "the defendant as will relieve the plaintiff of "the condition set forth in this complaint so "that the plaintiff may have adequate water "service both for domestic as well as fire pro- "tection. That the rates of the defendant "may be adjusted and equalized so that the "same shall be uniform and equal and that "said rates may be reduced so that the charges "may return to the defendant a reasonable re- "turn upon its investment. Plaintiff also "prays for an examination and appraisal of

"the water works system and plant of the de-
"fendant and for such other and further relief
"as may be meet and proper under the provi-
"sions of the Oregon Public Utilities Act, being
"Chapter 279 of the laws of the State of Ore-
"gon for the year 1911."

VII.

That after said complaint had been filed with the Railroad Commission of the State of Oregon, the Council of the said City of Salem did, on the 16th day of March, 1914, adopt a resolution known as Resolution No. 1294, the same being in words and figures as follows, to wit:

"BE IT RESOLVED by the Common
"council that the Railroad Commission in ad-
"justing the rates of the Salem Water Co. for
"the City of Salem on the private users, that
"they take into consideration the price at
"which the hydrants should be charged to
"make an equitable rate for the private user,
"and if the rate now charged the City for hy-
"drants by The Salem Water Co. is too high
"or too low, that it be adjusted accordingly.
"That the City Recorder be instructed to send
"a copy of this resolution to the Railroad
"Commission.

"Adopted by the Common Council this
"16th day of March, 1914.

"ATTEST: Chas, F. Elgin,
"City Recorder."

That a copy of said resolutions as prepared was given to the said Public Service Commission of the State of Oregon, and the said Public Service Commission of the State of Oregon in making the findings hereinafter referred to did act pursuant to said request so voiced in Resolution No. 1294, as adopted by the said Council of the City of Salem on the 16th day of May, 1914.

VIII.

That after said complaint of the City of Salem had been filed with the Public Service Commission and after the said resolution hereinbefore referred to as Resolution No. 1294 adopted by the City Council of the City of Salem on the 16th day of March, 1914, the said Public Service Commission did have a full hearing on all matters mentioned and referred to in said complaint and in said resolution and did thereafter and on or about the 19th day of August, 1914, make and render a decree wherein, among other things, it was found that the rate of $1.82 charged by the Salem Water, Light & Power Company to the City of Salem for its fire hydrants cast an undue burden upon the other users of water and did find and decree, among other things, that the City of Salem should pay unto the Salem Water, Light & Power Company two dollars and fifty cents ($2.50) per hydrant per month for all hydrants to which water was furnished by the said Salem Water, Light & Power Company. That pursuant to the order and decree of said Railroad Commission it was provided that said rate so established by it, and particularly the rate to be paid by the City

of Salem for hydrant rental, should be in force and become effective from and after the first day of October, 1914. That thereafter the said Salem Water, Light & Power Company continued to furnish unto the City of Salem and to the fire hydrants thereof water for the uses and purposes for which said fire hydrants were established, and the said City of Salem did accept said service without dissent.

IX.

That all bills due and payable to the Salem Water Light & Power Company from the City of Salem, as aforesaid, are payable in advance on or before the 10th day of each month. That heretofore and ever since the first day of October, 1914, the Salem Water, Light & Power Company has furnished to the City of Salem water for hydrant purposes, and the said City of Salem has accepted the same, but said City of Salem has refused and now refuses to pay for such service, although demand has been made therefor. That the months of such service, together with the number of hydrants served, together with the amount due therefor respectively, is as follows, to wit:

Year	Month	Number of Hydrants	Amount
1914	October	148	$370.00
"	November	155	387.50
"	December	157	392.50
1915	January	157	330.88
"	February	157	392.50
"	March	157	392.50
"	April	157	392.50

1915	May	157	392.50
"	June	159	397.50
"	July	163	407.50
"	August	166	415.00
"	September	166	415.00
"	October	167	417.50
"	November	167	417.50
"	December	167	417.50
1916	January	167	417.50
"	February	167	417.50
"	March	168	420.00
"	April	168	420.00
"	May	168	420.00
"	June	168	420.00
"	July	168	420.00
"	August	168	420.00
"	September	176	440.00
"	October	176	440.00
"	November	176	440.00
"	December	176	440.00
1917	January	176	440.00
"	February	176	440.00
"	March	176	440.00
"	April	176	440.00

That all bills due and payable to the Salem Water, Light & Power Company from the City of Salem as aforesaid are payable in advance on or before the tenth day of each month. That in addition to the foregoing amounts now due to the Salem Water, Light & Power Company from the City of Salem there is further due to the Salem Water, Light & Power Company from

the City of Salem interest on each of the foregoing amounts for rental services, said interest being at the rate of six per cent per annum from the respective due dates thereof.

X

That demand has been made upon the City of Salem for payment of the foregoing amounts, with interest thereon at the rate of six per cent. per annum from the respective due dates thereof, and the said City of Salem has refused to pay the same and now refuses to pay the same.

WHEREFORE, plaintiff prays that it have judgment against the City of Salem for the following amounts, to wit:

The sum of three hundred and seventy dollars ($370.), with interest thereon at the rate of six per cent. per annum from the 10th day of October, 1914; the further sum of three hundred eighty-seven and fifty-hundredths dollars ($387.50), with interest thereon at the rate of six per cent. per annum from the 10th day of November, 1914; the further sum of three hundred ninety-two and 50-100 dollars ($392.50), with interest thereon at the rate of six per cent. per annum from the 10th day of December, 1914; the further sum of three hundred thirty and 88-100 dollars ($330.88), with interest thereon at the rate of six per cent. per annum from the 10th day of January, 1915; the further sum of three hundred ninety-two and 50-100 dollars ($392.-50), with interest thereon at the rate of six per cent. per annum from the 10th day of February, 1915; the

further sum of three hundred ninety-two and 50-100 dollars ($392.50), with interest thereon at the rate of six per cent. per annum from the 10th day of March, 1915; the further sum of three hundred ninety-two and 50-100 dollars ($392.50), with interest thereon at the rate of six per cent. per annum from the 10th day of April, 1915; the further sum of three hundred ninety-two and 50-100 dollars ($392.50), with interest thereon at the rate of six per cent. per annum from the 10th day of May, 1915; the further sum of three hundred ninety-seven and 50-100 dollars ($397.50), with interest thereon at the rate of six per cent. per annum from the 10th day of June, 1915; the further sum of four hundred and seven and 50-100 dollars ($407.50), with interest the thereon at the rate of six per cent. per annum from the 10th day of July, 1915; the further sum of four hundred fifteen dollars ($415.), with interest thereon at the rate of six per cent. per annum from the 10th day of August, 1915; the further sum of four hundred fifteen dollars ($415.), with interest thereon at the rate of six per cent. per annum from the 10th day of September, 1915; the further sum of four hundred seventeen and 50-100 dollars ($417.50), with interest thereon at the rate of six per cent. per annum from the 10th day of October, 1915; the further sum of four hundred seventeen and 50-100 dollars ($417.50), with interest thereon at the rate of six per cent. per annum from the 10th day of November, 1915; the further sum of four hundred seventeen and 50-100 dollars ($417.50), with interest thereon at the rate of six per cent. per annum from the 10th day of December, 1915; the further sum of four hundred

seventeen and 50-100 dollars ($417.50), with interest thereon at the rate of six per cent. per annum from the 10th day of January, 1916; the further sum of four hundred seventeen and 50-100 dollars ($417.50), with interest thereon at the rate of six per cent. per annum from the 10th day of February, 1916; the further sum of four hundred twenty dollars ($420.), with interest thereon at the rate of six per cent. per annum from the 10th day of March, 1916; the further sum of four hundred twenty dollars ($420.), with interest thereon at the rate of six per cent. per annum from the 10th day of April, 1916; the further sum of four hundred twenty dollars ($420.). with interest thereon at the rate of six per cent. per annum from the 10th day of May, 1916; the further sum of four hundred twenty dollars ($420.), with interest thereon at the rate of six per cent. per annum from the 10th day of June, 1916; the further sum of four hundred twenty dollars ($420.), with interest thereon at the rate of six per cent. per annum from the 10th day of July, 1916; the further sum of four hundred twenty dollars ($420.), with interest thereon at the rate of six per cent. per annum from the 10th day of August, 1916; the further sum of four hundred forty dollars ($440.), with interest thereon at the rate of six per cent. per annum from the 10th day of September, 1916; the further sum of four hundred forty dollars ($440.), with interest thereon at the rate of six per cent. per annum from the 10th day of October, 1916; the further sum of four hundred forty dollars ($440.), with interest thereon at the rate of six per cent. per annum from the 10th day of November, 1916; the furth-

er sum of four hundred forty dollars ($440.), with interest thereon at the rate of six per cent. per annum from the 10th day of December, 1916; the further sum of four hundred forty dollars ($440.), with interest thereon at the rate of six per cent. per annum from the 10th day of January, 1917; the further sum of four hundred forty dollars ($440.), with interest thereon at the rate of six percent. per annum from the 10th day of February, 1917; the further sum of four hundred forty dollars ($440.), with interest thereon at the rate of six per cent. per annum from the 10th day of March, 1917; the further sum of four hundred forty dollars ($440.), with interest thereon at the rate of six per cent. per annum from the 10th day of April, 1917; and its costs and disbursements herein.

WOOD, MONTAGUE, HUNT & COOKINGHAM
Attorneys for Plaintiff.

UNITED STATES OF AMERICA,
DISTRICT OF OREGON.—ss.

I, C. A. PARK, being first duly sworn, on oath say that I am president of the SALEM WATER, LIGHT & POWER COMPANY, the above named plaintiff; that I am duly and legally authorized to make this verification; that I have read the foregoing complaint and the same is true as I verily believe.

C. A. PARK

Subscribed and sworn to before me this 12th day of May, 1917.

C. B. WOODWORTH
Notary Public for Oregon.
My commission expires
Nov. 30, 1920

(NOTARIAL SEAL)

And afterwards, to-wit, on the 28th day of August, 1917, the following proceedings were had in said cause.

ORDER PERMITTING AMENDMENT OF COMPLAINT BY INTERLINEATION

In accordance with the stipulation of the parties hereto, signed by their respective counsel and filed herein, it is hereby ordered, upon motion of the plaintiff, that the plaintiff be, and it hereby is given permission to amend its complaint herein by interlineation so as to allege that Ordinance No. 207, mentioned in Paragraph IV of said complaint was approved on April 16, 1891; that Ordinance No. 346, mentioned in said Paragraph IV was approved on April 16, 1898; and that Ordinance No. 368, also mentioned in said Paragraph IV, was approved on October 25, 1899; and further that the answer heretofore filed in this cause by the defendants shall stand for and be deemed to be the answer of the defendants to the complaint herein as amended, pursuant to this order, and the stipulation upon which it is based.

Done in open court this 28th day of August, 1917.

(Sgd) CHAS. E. WOLVERTON

District Judge

Filed August 28,1917. G. H. Marsh, Clerk.

And afterwards, to-wit, on the 15th day of February, 1918, there was duly filed in said Court, an amended answer in words and figures as follows, to-wit:

AMENDED ANSWER

Comes now the above named defendants by order of Court had and obtained, and files this, their amended

answer to plaintiff's complaint on file herein, and admit, deny, and allege, as follows:

I.

Admits each and every allegation contained in paragraph I of plaintiff's said complaint and the whole thereof.

II.

Answering paragraph II of plaintiff's said complaint, the defendants admit each and every allegation, matter and thing alleged in said paragraph and the whole thereof, and said defendants further allege that the said Acts of the Legislative Assembly referred to in said Paragraph II of plaintiff's complaint were duly and regularly passed by the Legislative Assembly of the State of Oregon, pursuant to Section 2 of Article XI of the Constitition of the State of Oregon, adopted by the people of the State of Oregon in the year 1859, and which provided as follows:

> "Corporations may be formed under general laws, but shall not be created by special laws, except for municipal purposes. All laws passed pursuant to this section may be altered, amended, or repealed, but not so as to impair or destroy any vested corporate rights."

and were and now are a part of the existing charter of said City of Salem, Oregon, and in and by an Act of the Legislative Assembly of the State of Oregon entitled:—

"An Act to amend Sections 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 18 of an Act entitled an Act to Incorporate the City of Salem and all Acts amendatory thereof, otherwise known as the Charter of the City of Salem, approved October, 1862, and Sections 27 and 36 of the Act supplemental thereto, approved February 16, 1887."

and which Act was filed in the office of the Secretary of State on the 25th day of February, 1889, and Acts amendatory thereto referred to in paragraph II of plaintiff's complaint, it was provided that Section III of said Act, incorporating the City of Salem should be amended so as to read as follows:—

"The City shall have power and is authorized to purchase, receive and hold property, both real and personal, within its corporate limits, for public buildings, public works and other city improvements, and may lease, sell or otherwise dispose of the same; to purchase, receive and hold property, both real and personal, beyond its limits, for the establishment and maintanance of a hospital for the reception, care and treatment of persons infected with contagious and dangerous diseases; for the erection and operation of water and gas or other illuminating works for the supply of the City and the inhabitants thereof with water and light, and to control and manage said hospital and works, or to lease, sell or

> dispose of the same for the benefit of the city; to make contracts, to sue and be sued; to have and use a corporate seal and the same to change at pleasure."

and in and by an Act of the Legislative Assembly of the State of Oregon, entitled:—

> "An Act to amend Section 6 of an Act entitled "An Act to Incorporate the City of Salem," approved October, 1862, as amended by an Act entitled "An Act to amend an Act entitled 'An Act to Incorporate the City of Salem,' approved October, 1862," approved October 28, 1874, as amended by an Act entitled "An Act entitled an Act to amend Sections 6, 8, 9, 16 and 23 of the Charter of the City of Salem, and to Provide for the Improvement and Extension of Streets, and for the Construction and Repair of Sidewalks, Sewers and drains in said City, and to provide for the performance of the Duties of Recorder in Case of His Disability," approved February 16, 1887, as amended by an Act entitled "An Act to amend Sections 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, and 18 of an Act entitled 'An Act to Incorporate the City of Salem,' and all Acts amendatory thereof, otherwise Known as the Charter of said City of Salem, approved October, 1862, and Sections 27 and 36 of an Act Supplemental Thereto," approved February

16, 1887, filed in the Office of the Secretary of State February 25, 1889."

and which Act was filed in the office of the Secretary of State on the 21st day of February, 1891, and which took effect on said day by virtue of an emergency clause contained in Section II of said Act, and which provided that said Act incorporating the City of Salem should be amended by amending Section VI thereof so as to read as follows:—

> "The Mayor and Aldermen shall comprise the common council of said City, and at any meeting shall have exclusive power—* * * *
> *Subdivision* 6. To provide for lighting the streets and furnishing the City and the Inhabitants thereof with gas or other light, and with pure and wholesome water, and for such purposes may construct such water, gas or other works, within or without the city limits, as may be necessary or convenient therefor; provided, that the council may grant and allow the use of the streets and alleys of the city to any person, company or corporation who may desire to establish works for supplying the city and the inhabitants thereof with such water or light upon such terms and conditions as the council may prescribe.
> *Subdivision* 12. To establish and regulate a fire department; to provide for the prevention and extinguishment of fires and for the protection of property endangered thereby; to appoint fire wardens and prescribe their duties,

and to compel any person or persons present to aid in the extinguishing of such fires and the protection of property exposed thereto.

Subdivision 27. To make by-laws and ordinances not inconsistent with the laws of the United States or of this State, to carry into effect the provisions of this charter, and to provide for the punishment of persons violating city ordinances by fine or imprisonment, or both, and the working of such persons on the streets of the City or at any other work; but no fine shall exceed the sum of One Hundred dollars, nor shall any imprisonment exceed twenty days."

and the foregoing sections quoted and the subdivisions hereof were and now are a part of the Acts of the Legislative Assembly referred to in said Paragraph II of plaintiff's complaint, and are now in force and effect, and are a part of the existing charter of said City of Salem, being Section III and subdivisions 6, 12, and 27 of Section VI of said Acts referred to in Paragraph II of plaintiff's said complaint.

III

Answering paragraph III of plaintiff's complaint, defendants admit each and every allegation, matter, and thing alleged in said paragraph and the whole thereof, and further allege that said Chapter No. 279 of the Session Laws of 1911 was enacted subsequent to the Acts of the Legislative Assembly referred to in paragraph II of plaintiff's complaint, and subsequent to the amendment to Section II of Article 11 of the

Constitution of the State of Oregon as the same was amended by the vote of the people at the general election held November 8, 1910, and subsequent to the adoption of Section Ia of Article IV of the Constitution of the State of Oregon as hereinafter alleged, and subsequent to the amendment to Section VI by said act of the Legislative Assembly filed on the 21st of February, 1891, and referred to in paragraph II of this Amended Answer and which provided, as follows:—

> "The mayor and aldermen shall comprise the common council of the City, and at any meeting shall have exclusive power—
> *Subdivision* 26. To permit, allow and regulate the laying down of tracks, street cars and other railroads upon such streets as the council may designate, and upon such terms and conditions as the council may prescribe; to allow and regulate the erection and maintenance of poles or poles and wires for telegraph, telephone, electric light or other purposes, upon or over the streets, alleys or public grounds of the City; to permit and regulate the use of the streets, alleys, and public grounds of the City for laying down and repairing gas and water mains, for building and repairing sewers and the erection of gas or other lights; to preserve the streets, alleys, side and cross-walks, bridges and public grounds from injury, and prevent the unlawful use of the same, and to regulate their use; to fix the maximum rate of wharfage, rates for gas or other lights, for carrying

passengers on street railways, and water rates."

and subsequent to an act of the Legislative Assembly passed on the.....day of February, 1903, whereby Section VI of the Charter of said City of Salem, hereinbefore referred to was amended by adding a new subdivision to section VI, which was as follows:—

"The mayor and aldermen shall comprise the Common Council of said City, and at any meeting thereof shall have exclusive power:

Subdivision 41. To license, regulate, and tax telephone companies, telephone offices, and to fix the maximum rate to be charged by telephone companies for the rental and use of telephones; to license, regulate and tax water, gas, and electric light and power companies, and to fix the maximum rates to be charged by any person, company, or corporation for water, electric or gas light, or power, supplied by such person or company, to private or public consumers within the city; to license, regulate, and tax express and telegraph companies; and to license, regulate and tax bicycles, tricycles, tandoms, and automobiles, and to regulate control, or prohibit the use of any therof on the streets of the City."

IV

Answering paragraph IV of plaintiff's said complaint, the defendants admit each and every allegation therein contained and the whole thereof, and further

allege that said ordinances No. 207, No 346, and No. 368 referred to in said paragraph IV of plaintiff's complaint were duly and regularly enacted and passed by the Common Council of said defendant, City of Salem, Oregon, prior to the said Chapter 279 of the Session Laws for 1911 becoming effective, and under and by virtue of the provisions of Section III and subdivisions 6, 12, and 27 of Section VI of the Charter of said defendant City set forth in paragraph II of defendant's answer.

V

Answering paragraph V of plaintiff's said complaint the defendants admit each and every allegation set forth in said paragraph, and further allege that said Section IV of Ordinance No. 207 of the City of Salem was and is, among others one of the terms and conditions prescribed by the Common Council of said city for allowing the plaintiff's assignor, the Salem Water Company, a corporation, the use of the streets and alleys of the said city of Salem for the establishment of a water works for supplying the said City of Salem and its inhabitants thereof, with water for fire protection and other purposes, and which was to be paid for as the same was furnished and supplied by plaintiff's and plaintiff's Assignor by the defendant, City of Salem by moneys raised by taxation, and the same was and is a general obligation of said defendant city, and was, and is, one of the considerations for granting said Salem Water Company the privileges and franchises for laying down pipes in the streets and

alleys of defendant City, and was, and is a preferential rate for furnishing water to defendant City as aforesaid; and defendants further allege that in and by said Ordinance No. 207, Ordinance No. 346 and Ordinance No. 368 that in consideration of the said Common Council granting unto said Salem Water Company and its successors and assigns, the right to use the streets and alleys of said City for the purposes of supplying water to the residents of such city, it was provided in section II of said Ordinance No. 207, as follows:—

> "That the Salem Water Company, its successors and assigns, shall furnish the City of Salem, free of charge, with water for two fountains in Wilson Avenue and one in Marion Square, from the first day of May to the 31st day of October of each year, and water for the use of all engine houses, rooms for firemen's meetings, the council chambers, the city prison and all offices in the City buildings used by any of its officers or agents, and shall also furnish water for a public drinking fountain for man and beast at such place as may be designated by the Common Council;"

and was provided by Section VII thereof as follows:—

> "The Salem Water Company, their successors or assigns, shall file their acceptance of this grant in writing with the City Recorder within ten days after the passage of this ordinance."

Passed April 15, 1891. Approved April 16, 1891, and thereupon and prior to ten days after the passage of said ordinance No. 207, the said Salem Water Company accepted the terms and provisions of said ordinance, and particularly Section IV thereof, set forth in paragraph V of plaintiff's said complaint, became a contract between defendant, City of Salem, Oregon, and said Salem Water Company, its successors and assigns, the plaintiff herein.

VI

"Answering paragraph VI of plaintiff's said complaint, the defendants admit each and every allegation therein contained and further allege that for long prior to the filling of said complaint with the Public Service Commission of the State of Oregon, the defendant City was informed and believed that the rates, tariffs, and charges made by said Salem Water Company, and its successors and assigns, the plaintiff herein for supplying water to the inhabitants of said City, the said rates, tariffs, and charges were unreasonable, unjust, discriminatory, disproportionate, and unequal as between different patrons and consumers thereof; and thereupon for the purpose of securing an appraisement of the valuation of the property and equipment of the said plaintiff and having determined by the said Public Service Commission as to whether or not the said plaintiff herein was charging its patrons unreasonable, unjust rates, tariffs, and charges for the private use of water and as to determine whether or not the said rates were discriminatory, disproportionate, and unequal as between private users of water furnished

by said plaintiff, and to have findings made thereon by said Public Service Commission, as said Public Service Commission is empowered to do, the defendant, City of Salem, caused to be filed with the said Public Service Commission the complaint and petition referred to in paragraph VI of plaintiff's complaint, a copy of which is hereunto attached marked "Exhibit A" hereof and by this reference made a part of this answer, and said complaint was not filed by said defendant, City of Salem, for the purpose of changing any fire water rate, tariff, or charge fixed by the City of Salem by Section II of said Ordinance No. 207 and Ordinances amendatory thereof, or by changing and reduced or preferential rate fixed in said Section IV of said Ordinance 207 of the City of Salem as between defendant City and the plaintiff herein.

VII

Answering paragraph VII of plaintiff's complaint said defendants admit each and every allegation therein contained, and further allege that subsequent to the filing of said petition referred to in paragraph VI hereof, and which is "Exhibit A" of this amended answer with the Public Service Commission of the State of Oregon, and while the said petition was under consideration by said Commission, the members of said Comission requested the City Attorney of defendant City to secure the adoption of a resolution by the Common Council of defendant City embodying the terms set forth in said Resolution No. 1294, but in and by Section VI of said Ordinance No. 207, and in and by Section III of said Ordinance No. 346, and in and by

Section III of Ordinance No. 368, it was provided as follows:—

> "This ordinance shall not be altered, amended, or repealed without the consent of the said Salem Water Company, except, for the violation by them of any of the provisions of this Ordinance."

and thereafter, in accordance with the terms and procisions of said Ordinances, and a short time prior to the introduction of said Resolution No. 1294 into the Common Council of defendant City through its City Attorney, requested the plaintiff herein to join in said resolution and consent and agree with said defendant City, that said Public Service Commission should make a finding and determination as to the amount of a just and reasonable charge for said defendant City to pay the plaintiff for supplying the hydrants of said defendant City with water, for the purposes hereinbefore alleged, and thereafter, the defendant City, through its Common Council would amend Section IV of said Ordinance 207 in accordance with the order, finding and decree of the said Public Service Commission as to the amount of a just and reasonable rate and charge to be paid by defendant City to plaintiff for furnishing and supplying the hydrants and cisterns of said defendant City with water, but said plaintiff refused to join with defendant City in said Resolution No. 1294 or agree or consent thereto prior or after the adoption thereof by the Common Council of said defendant City, and prior to a determination thereof by the Public Service Commission, and thereafter, defen-

dant City for the purpose of securing and ascertaining the amount of a just and reasonable charge, rate, and tariff to be paid by defendant City to the plaintiff for furnishing defendant City with water for its hydrants and cisterns, and only as advisory in such matters and not otherwise, defendant City adopted the aforesaid Resolution and caused to be filed with the said Public Service Commission said Resolution No. 1294, so as to enable said defendant City thereafter, if it so desired to do with the consent of said plaintiff, so amend said Ordinance No. 207, and Ordinance No. 346 and No. 368, amendatory thereof, in accordance with the finding and determination of the Public Service Commission as to the amount of said rate and charge and tariff found to be just and reasonable, and defendant city did never agree or contract with said plaintiff that said City would be bound or agree to the rate, charge, and tariff found to be reasonable by said Public Service Commission, in reference to any reduced or preferential rate fixed by defendant City, as a part of the consideration for granting plaintiff's Assignors the rights, privileges, and franchises hereinbefore alleged.

VIII

Answering paragraph VIII of plaintiff's said complaint the defendants admit each and every allegation contained in paragraph VIII, except, defendants deny that the City of Salem did accept the use of water for its fire hydrants without dissent, and defendants further allege that the said City of Salem immediately upon the making of said order and decree by the Public Ser-

vice Commission, as alleged in said Paragraph VIII of plaintiff's complaint, a copy of which is hereunto attached marked "Exhibit B" hereof and by this reference made a part of this answer, the said City of Salem refused to accept or abide by the terms and directions of said order and decree of said Public Service Commission, insofar, as said order or decree attempted or purported to increse the rate and charge fixed by Section IV of said Ordinance No. 207, in the sum of One and 82-100 ($1.82) dollars per month for water service for each hydrant and cistern, and immediately so notified the said plaintiff, and plaintiff further alleges: that the said Public Service Commission of the State of Oregon had no power or jurisdiction to change any rate or charge fixed in the franchise and contract between the plaintiff and the defendant City by virtue of any provision contained in said Chapter No. 279 of the Session Laws for 1911, for it was provided by an Act of the Legislative Assembly of the State of Oregon, known as Chapter No. 80 and filed in the Office of the Secretary of State, February 15, 1911, wherein it was provided in section II of said act as follows:—

> "All contracts or agreements heretofore made, and now in effect for the sale and disposal of water or electricity by incorporated cities or towns, and by any person, persons, or corporporation, operating, controlling or owning water or electric light and power systems, to any person persons or corporation within or without the limits of such incorporated city or town, in which such system is operated, are

hereby ratified and declared legal and valid contracts, insofar as the right of such city or town to contract with reference to same is concerned."

and defendant further alleges: that in and by Section No. 63 of said Chapter No. 279 of the Session Laws of 1911, it is provided as follows:

"Nothing herein shall prevent the transportation of persons or property or the production, transmission, delivery or furnishing of heat, light, water or power, or the conveying of telegraph or telephone messages within this State free or at reduced rates for the United States, the State, or any municipality thereof, or for charitable purposes, or to employees of any such public utility for their own exclusive use and benefit, nor prevent any such public utility from giving free transportation or service, or reduced rates therefor, to its officers, agents, surgeons, physicians, employees and attorneys at law, or members of their families, or to former employees to such public utilities or members of their families where such former employees have become disabled in the service of such public utility or are unable from physical disqualification to continue in the service, or to members of families of deceased employees of such public utility; to ministers of religion inmates of hospitals and charitable and eleemosynary institutions and persons exclusively engaged in charitable and eleemosynary work.

The Commission may in its discretion require to be filed with it by any public utility a list, verified under oath of the President, manager, superintendent or secretary of any public utility, of all free or reduced rate privileges granted by such public utility under the provisions of this section."

IX

Answering paragraph IX of plaintiff's said complaint, defendants deny each and every allegation contained in said paragraph and the whole thereof, and further allege that the plaintiff, commencing with the month of October, 1914, and each and every month thereafter, demanded payment from the defendant City for water service for the hydrants and cisterns of said City of Salem in the sum of two and 50-100 ($2.50) dollars per month, at the times and in the amounts set forth in paragraph said paragraph, and that the said defendant, City of Salem, refused to pay the same, or any part thereof, except, the defendant through its duly authorized officers of said City, offered to pay the said plaintiff the sum of one and 82-100 ($1.82) dollars per month for each hydrant and cistern used by said defendant, and actually tendered plaintiff the money therefor at the times and in the amounts specified in defendants' "Exhibit C" hereof, hereunto attached and by this reference made a part of this answer, but the plaintiff refused to accept the same, or any part thereof.

X

Answering paragraph X of plaintiff's complaint, defendants deny the same and the whole thereof, except as hereinbefore expressly admitted or alleged.

For a first and seperate amended answer and defense said defendants allege as follows:

I

That insofar as said Chapter 279 of the Session Laws of Oregon for 1911 empowers the Public Service Commission to change or fix the rates, charges, and tariffs in the amounts fixed by said City of Salem in said Ordinance No. 207, agreed upon between the plaintiff herein and said defendant, as is provided in Section IV of said Ordinance No. 207, for supplying the hydrants and cisterns of said City with water by the plaintiff herein, and delegated to said City by Section III and Subdivisions 6, 12 and 27 of Section VI of said Acts of the Legislative Assembly referred to in paragraph II of plaintiff's complaint and set forth in said Resoulution No. 1294, and the said order and decree of said Public Service Commission increasing the rates, tariffs and charges to be paid by defendant city to plaintiff for supplying its hydrants and cisterns with water, from one and 82-100 ($1.82) dollars per month per hydrant to the sum of two and 50-100 ($2.-50) dollars per month per hydrant, is an impairment of the obligations of defendant's and plaintiff's said contract whereby in consideration of the defendant City granting the plaintiff the rights, franchises, and

privileges of laying down pipes in the streets and alleys of said City of Salem for the purpose of supplying the inhabitants thereof with water, the plaintiff agreed to supply the hydrants and cisterns of defendant city with water for the sum of one and 82-100 ($1.82) dollars per month, and is in violation of Section X of Article I of the Constitution of the United States, and is a taking of defendant's property without due process of law and a denial of the equal protection of the laws inhibited by Section I of the Fourteenth Amendment of the Constitution of the United States, and is likewise a violation of Section XXI of Article I of the Constitution of the State of Oregon providing that no law impairing the obligation of a contract shall ever be passed.

For a second further and seperate Amended Answer and defense to plaintiff's complaint on file herein, defendants allege as follows:

I

That subsequent to the Acts of the Legislative Assembly of the State of Oregon incorporating the City of Salem, Oregon, as alleged in Paragraph II of plaintiff's complaint and paragraph II of defendant's answer, and on or about the 4th day of June, 1906, Section II of Article XI of the Constitution of the State of Oregon was amended to read as follows:—

> "Corporations may be formed under general laws, but shall not be created by the legislative assembly by special laws. The Legislative

Assembly shall not enact, amend, or repeal any charter or act of incorporation for any municipality, city or town. The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the constitution and criminal laws of the State of Oregon."

and on or about the said 4th day of June, 1906, Section I of Article IV of said constitution was amended by adding thereto Section I which is as follows:—

"The referendum may be demanded by the people against one or more items, sections, or parts of any act of the legislative assembly in the same manner in which such power may be exercised against a complete act. The filing of a referendum petition against one or more items, sections, or parts of an act shall not delay the remainder of that act from becoming operative. The initiative and referendum powers reserved by the people by this constitution are hereby further reserved to the legal voters of every municipality and district, as to all local, special, and municipal legislation, of every character, in or for their respective municipalities, and districts. The manner of exercising said powers shall be prescribed by general laws, except that cities and towns may provide for the manner of exersising the initiative and referendum powers as to their municipal legislation. Not more than ten per cent of the legal

> voters may be required to order the referendum, nor more than fifteen per cent to propose any measure, by the initative, in any city or town.

and in so far as the Public Service Commisssion of the State of Oregon is invested with power to change any rate, tariff and charge for furnishing the hydrants and cisterns of said city with water enacted by defendant City pursuant to the terms and provisions of Section III and Subdivision 6, 12, 27 of Section VI of said Acts of the Legislative Assembly incorporating the City of Salem, and set forth in paragraph II of defendant's amended answer herein, and referred to in paragraph II of plaintiff' complaint, and insofar as the order of the said Public Service Commisssion referred to in paragraph VIII of plaintiff's complaint attempts to change and increase the rates, charges, and tariffs fixed in Section IV of said Ordinance No. 207 and Ordinances amendatory thereof referred to in paragraph V of plaintiff's complaint and duly enacted by the common council of defendant City as alleged in paragraph IV of defendant's amended answer is an attempt by an Act of the Legislative Assembly of the State of Oregon, to amend Section IV of said Ordinance No. 207, and to amend Section III and subdivisions 6, 12, 26, 27 and 41 of Section VI of said Acts of the Legislative Assembly incorporating the City of Salem, as alleged in paragraph II, and paragraph III, of defendant's amended answer herein.

For a third and seperate answer and defense to

plaintiff's complaint on file herein, defendant allege:

I

That in and by Section XVIII of said act to incorporate the City of Salem, referred to in paragraph II of plaintiff's complaint on file herein, it is provided as follows:—

> "No ordinance passed by the Council shall go into force or be of any effect until approved by the mayor, except as provided in Sections XVIX, XX and XXI, and in and by the rules of the Common Council of the City of Salem, Oregon, duly adopted on the 15th day of March, 1909, it was provided in rule seven thereof as follows:
>
> 'Each committee to which any matter is referred shall submit at the next regular meeting after such reference, unless further time be granted by the council, a written or verbal report on same, with or without recommendation. Such report shall be presented, in order and in open session, by the chairman, or other member of the committee, and if written it shall be filed by the Recorder and entered upon the journal. When a committee fails to report on a subject, the matter may be brought before the council by unanimous consent, or by motion. All resolutions shall be in writing and numbered consecutively in the order in which they are introduced, ' and in rule 8 thereof as follows:—'Proposed ordinances shall be known

as Ordinance Bills. They shall be numbered consecutively and filed by the Recorder in the order in which they are introduced. All bills and resolutions shall contain upon the backs thereof the name of the member or committee introducing the same; provided, any member of any committee can introduce any bill or resolution by request, and so designate on the back thereof. If objection be made to the introduction of an ordinance bill, it shall lie over until the next meeting except when the bill is reported by the committee, or unless otherwise directed by the council. And in rule 9 thereof as follows:— Every Ordinance Bill shall receive three readings previous to its being passed. The presiding officer shall give notice at each reading whether it be the first, second or third. If the bill be objected to on its first reading, the presiding officer shall immediately state the question to be 'Shall the bill be rejected?" if no objection be made, or if the question to reject be lost, the bill shall be read the second time at once. By unanimous consent, the bill may be read the second time by title, and in rule 10 thereof, as follows:— 'Upon the second reading of the bill the presiding officer shall state: 'This is the second reading of the bill; it is ready for commitment or amendment.' No bill shall be amended or committed until after it has been twice read; and in rule 11 thereof as follows: 'If a bill be

so amended as to make it necessary, in the opinion of the majority, that it should be engrossed, it may be referred to the Recorder for that purpose, and he shall at the next regular meeting, report a correctly engossed copy of the bill, and in rule 12 thereof as follows:—' No bill shall be read the third time during the same session at which it is introduced, except by unanimous consent of the council, expressed by an affirmative vote on calling the roll, and in rule 13 thereof as follows: 'The final question after the second reading of every bill shall be, 'Shall the bill be read the third time?' No amendment shall be received for discussion after the third reading of any bill, but it shall at all times be in order, before the final passage of any such bill, to move its commitment under special instructions;' and in rule 14 thereof as follows:— 'After the third reading of the bill, the presiding officer shall state the questions to be, 'Shall the bill pass?' The recorder shall call the roll and enter the ayes and noes in the journal;' and in rule 15 thereof as follows:— 'After the passage of a bill, the question shall be stated to be, 'Shall the title of the bill be the title of the ordinance?' A majority of all of the members elected to the council shall be necessary to pass every ordinance bill;' and in rule 16 thereof as follows:— 'The recorder shall number all the ordinances heretofore passed, that remain unnumbered, in the order of their passage, and

hereafter each ordinance shall be known by its appropriate number, every new ordinance receiving the number to which it is entitled;' and in rule 17 thereof as follows:— 'All ordinances shall be signed by the Mayor and Recorder, and shall have thereon the date of passage by the council and date of approval by the Mayor, and in so far as the said resolution No. 1294 of the Common Council of the City of Salem, referred to in paragraph VII of plaintiff's complaint, purports or attempts by its terms to amend section IV of said Ordinance No. 207 referred to in paragraph IV of plaintiff's complaint, the said Resolution is void and of no effect for said Resolution No. 1294 did not receive three previous readings before its adoption by the Common Council of said City of Salem, nor was said resolution submitted to the Mayor or approved by him.

WHEREFORE, defendants having fully answered plaintiff's complaint pray to be hence dismissed with judgment for their costs and disbursements incurred herein.

B. W. MACY
WM. P. LORD,
Attorneys for defendants

"EXHIBIT A"

BEFORE THE RAILROAD COMMISSION OF THE STATE OF OREGON

The City of Salem, a municipal corporation,

Plaintiff,

vs.

Salem Water, Light & Power Co., a corporation,

NO. U. F. 45

COMPLAINT

Defendant.

Comes now the plaintiff above named and for cause of complaint against the defendant, respectfully shows:

1. That the plaintiff is now and at all the times hereinafter mentioned has been, a municipal corporation organized and existing under and by virtue of the laws of the State of Oregon, and located in the County of Marion in said State.

2. That the above named defendant is a corporation organized and existing under and by virtue of the laws of the State of Arizona and is a public utility engaged in the business of supplying water to the inhabitants of the plaintiff municipal corporation and as a part of such business owns, operates and controls a water works and pumping plant and water mains, reservoirs, pumps and other miscellaneous water works, equipment and apparatus all of which is used in supplying water service to and for the public. That as a pub-

lic utility the defendant is subject to the provisions of Chapter 279 of the laws of Oregon for the year 1911.

3. That the territory embraced within the corporate limits of the City of Salem is divided into four general districts commonly known as North Salem, South Salem, East Salem, and Englewood, which are distinguished from the original town site of Salem by the fact that the said districts or parts of the City lie respectively North of Mill Creek, South of Mill Creek, East of the main channel of Mill Creek and Northeast of North Mill Creek and East of 14th Street, the names of said districts being used merely as convenient reference terms. That there has recently been constructed in said City, four general sanitary sewer systems known as the North Salem, South Salem, Marion Street extension and Union Street sewers. That said sewers furnish a reasonably complete system of sanitary drainage for the said general districts of the plaintiff. That in each of said sections or districts of the plaintiff there are many residences which are connected to said sewer system, which are entirely without public water service and are unable to secure the same from defendant for the reason that the distribution mains of the defendant are not extended to any considerable extent through said outlying districts of the plaintiff. That in each of said sections or districts of plaintiff there are many residences and other buildings which are not connected to the said sanitary sewer systems and which are greatly in need of such connection and sewer drainage but a connection with the said sewers would be useless and futile without adequate and efficient water ser-

vice and that they are unable to get such water from the distribution mains of the defendant for the reason that the defendant has failed, neglected and refused to extend its mains to supply such residences and other buildings.

That the public is ready, willing and able to pay for water service and have repeatedly demanded the same in all of the sections of the City above mentioned. That the defendant has failed, neglected and refused to make extensions in said districts in sufficient number and of sufficient extent to supply numerous residences and other buildings which are located therein and which are demanding the said service to such an extent and in sufficient numbers as would return to the defendant a reasonable income upon the investment required to install and operate the same.

4. That in all the said outlying districts or sections of the City there are many residences and buildings entirely without public water service and that many of the residences and other buildings which are furnished and supplied by the defendant receive such service through small distribution mains and that at all times at the outlets of the service pipes of many of the consumers of the defendant, the pressure is very low and insufficient to furnish either satisfactory domestic service or any protection whatever against fire. That the size of the distribution mains of the defendant in nearly all cases in said districts or sections, are so small and of such limited carrying capacity at the pressure maintained by the defendant, that the public is deprived of the fire protection to which it is reasonably

entitled by the installation of fire hydrants upon and along the line of its distribution mains at reasonable intervals.

That by reason of the foregoing facts the plaintiff alleges that the public water service furnished by the defendant to the public is inadequate and insufficient to meet the reasonable demands and needs of the public.

5. That the schedule of charges, rates and tolls in force and effect and on file in the office of the Railroad Commission of the State of Oregon are purely arbitrary with relation to the cost of furnishing such service both as to the schedule of meter rates and flat rates set forth in the said schedule. That the flat rates of the defendant are founded upon purely arbitrary classifications according to the number of fixtures and vessels supplied and the classes of business being served and on areas served with irrigation all of which classifications are made without regard to the quantity of water actually furnished or the cost of making the service and under substantially the same conditions in individual cases meter service is either required from the customer or permitted to the customer which, in comparison with the flat rates in force and effect along with the said meter rates creates a condition of inequality and unjust descrimination.

6. That the rates, tolls and charges of the defendant as shown by the schedule thereof on file and of record in the office of the Railroad Commission of the State of Oregon are producing a revenue to the defendant upon the investment of the defendant, in excess of a reason-

able return upon the amount of money invested in said public water works system and are therefore unjust, unreasonable and unlawful.

WHEREFORE, plaintiff prays your Commission to take such necessary orders for the extension of the distribution mains of the defendant as will relieve the plaintiff of the conditions set forth in this complaint so that the plaintiff may have adequate water service both for domestic as well as fire protection. That the rates of the defendant may be adjusted and equalified so that the same shall be uniform and equal and that said rates may be reduced so that the charges may return to the defendant a reasonable return upon its investment. Plaintiff also prays for an examination and appraisal of the water works system and plant of the defendant and for such other and further relief as may be meet and proper under the provisions of the Oregon Public Utilities Act being Chapter 279 of the laws of the State of Oregon for the year 1911.

CITY OF SALEM, OREGON,
Signed by B. L. STEEVES
Mayor,
ROLLIN PAGE,
City Attorney.

State of Oregon
ss
County of Marion,

I, Rollin K. Page, City Attorney, attorney for plaintiff, do hereby certify that I have carefully compared the foregoing copy of complaint with the original

thereof; that it is a correct transcript therefrom and of the whole thereof.

Dated this 20th day of May, 1913.

ROLLIN K. PAGE,
Attorney for plaintiff.

Endorsed as follows:

Before the Railroad Commission of the State of Oregon.

City of Salem, a municipal corporation, plaintiff, vs. Salem Water, Light & Power Co., a corporation, defendant. Complaint, file No. UF-45.

"EXHIBIT B"

FILE U-F-45

BEFORE THE RAILROAD COMMISSION OF OREGON

CITY OF SALEM,

Plaintiff,

vs.

SALEM WATER, LIGHT & POWER COMPANY,

Defendant.

ORDER OF COMMISSION

Entered August 19, 1914

Before the Railroad Commission of Oregon

CITY OF SALEM,

Plaintiff, ORDER

vs. U-F45

SALEM WATER, LIGHT & POWER COMPANY,

Defendant.

The complaint in the above entitled matter was brought by the City of Salem, a municipal corporation of the State of Oregon, against the Salem Water, Light & Power Company, a public utility corporation. The subject matter of the complaint involves generally the reasonableness of the rates charged by the utility and the adequacy of the pressure afforded within the City of Salem. As the questions at issue necessarily involved a valuation of the property of the utility used and useful in the public service, the complaint asked that an investigation be made by the Commission under the provisions of sections 9 and 10 of Chapter 279 of the General Laws of Oregon for the year 1911, for the purpose of determining the value of the utility's plant, and such investigation was made by the Commission as a part of the hearing on the complaint.

Appearances—

For the plaintiff, Rollin K. Page, City Attorney.

For the defendant, Wm. J. Hagenah.

For the purpose of better advising the Commission, a formal demand was served on the defendant, requiring it to answer in detail as to its capitalization, funded and other indebtedness, and franchises; to supply an inventory of its property, both that used in public service and otherwise; to state the cost thereof, and the estimated cost of reproducing the same, and the depreciation which had accrued thereon; the earnings and expenses from utility service and from other sources; the units of production, and the number of each class of customers served; and the fixed charges, taxes and other charges to be met by the defendant.

This information was embodied in returns submitted, and was examined and checked by the Commission's experts. The Commission was informally advised by the plaintiff City, in advance of the hearing, that it was expected the pertinent facts as to the value of the property of the defendant (except real estate), and all facts as to the reasonableness of defendants rates, to be disclosed by an examination and analysis of defendant's account, would be developed as the result of the labors of the Commission's engineering and accounting force. Such evidence as was introduced on the hearing by the plaintiff as to these points was obtained by examination of the members of the Commission's staff.

Hearings were duly held upon the complaint and answer, after due notice to all parties. The testimony of numerous witnesses was received, and many exhibits were offered and considered. Both plaintiff and defendant waived argument, and the matter was submitted Commission on April 7, 1914. Upon subsequent examination of the record, it became apparent that, due to the intermingling of the utility accounts of the defendant company with the accounts of operations other than those as a public utility, and with other persons and corporations, the returns submitted to the Commission by defendant did not accurately represent the matters therein set forth in certain important particulars. Thereupon, the Commission caused a re-examination of the defendant's accounts to be made upon its own motion. As a result, the parties on July 22, 1914, filed with the Commisssion statements showing corrections

found to be necessary and stipulated they should be considered as in evidence.

From the record before it, the Commission finds:

1. Plaintiff City of Salem is a municipal corporation of the State of Oregon, which has brought the complaint herein by order of its Common Council.

Defendant Salem Water, Light & Power Company is a corporation of the State of Arizona, authorized to transact business within Oregon, owns and operates as a public utility a water system supplying the City of Salem with water for domestic and fire purposes.

2. Defendant's authorized capital stock is $500,000, of which, on December 30, 1913, there had been issued and was then outstanding $416,300 of par value. Of this amount, $300 was paid in cash, and $416,000 was issued for the property of the Salem Water Company, as hereinafter set out. The funded debt of the company on December 31, 1913, consisted of $154,000 in 6% bonds and $80,000 in 5% bonds. The return made by the defendant to the Commission states that all of such funded debt was issued for cash, without commission or discount; the stock and bonds of defendant are not currently on the market, and no quotations thereon are available. From the record it is apparent, as will hereinafter be more fully set out, that of such funded debt, $25,000 in bonds bearing 6% interest was issued for property which at that time was worth not to exceed $5,000, and of which only a small part, at the best, was needed or useful in the economic operation of defendant as a public utility.

3. The defendant is successor by purchase of the

Salem Water Company, an Oregon corporation, which had previously constructed and was operating a system of water works in the City of Salem. The Salem Water Company is still a going concern, and was and is the owner of a considerable amount of other property, real and personal, not devoted to the public use as a water utility. April 21, 1911, a sale was made, which became effective May 1, 1911, whereby the water works property of the Salem Water Company was transfered to the Salem Water, Light & Power Company for an expressed consideration of $541,000. In settlement of such expressed consideration the Salem Water, Light & Power Company assumed the outstanding indebtedness of the Salem Water Company, secured by 6% first mortgage bonds of that company, to the amount of $125,000, and issued to the Salem Water Company $416,000 in the capital stock of the Salem Water, Light & Power Company. At the same time, for the purpose of organizing the Salem Water, Light & Power Company, and qualifying its directors, $300 in capital stock was subscribed for and paid in cash. The first mortgage bonds assumed have since been partially refunded by other now outstanding bonds. Other non-operating property of the Salem Water Company was not transferred to the Salem Water, Light & Power Company, and still remains in the name of the Salem Water Company.

4. By ordinance No. 207 of the City of Salem, approved April 16, 1891, there was granted to the Salem Water Company, its successors and assigns, a franchise to lay water mains in the city streets and alleys for a period of thirty years. In consideration of such fran-

chise the water company was required to furnish the City of Salem water for certain municipal purposes free of charge, and to maintain fire hydrants and cisterns as therein specified, with a pressure of at least 60 pounds at any and all times at each hydrant in the central portion of the city. It was provided by the franchise that the holder should not at any time charge higher rates for water than are customarily allowed for water in towns or cities of like population on the Pacific Coast, nor charge more than $1.82 per month for each hydrant or cistern actually supplied.

By ordinance No 346 of the City of Salem, approved April 16, 1898, the franchise theretofore granted to Salem Water Company was, with the consent of that company, modified to provide that the franchise should continue for the period of 50 years.

5. The franchise (as amended) was transferred with the public utility property of the Salem Water Company to the defendant, which has since operated under the same as a public utility.

6. The records and accounts of the Salem Water Company and of the Salem Water, Light & Power Company prior to December 31, 1913, were intermingled and confused, so that it has been difficult clearly to distinguish between the properties of the two companies, and between properties devoted to the public use and other properties, and private and non-utility ventures of the two companies and their stockholders and officers, and to allocate the revenues derived and expenses thereof.

By the call for information upon the defendant,

hereinbefore referred to, defendant was required to file with the Commission, among other things , a statement showing the original cost of its property, if known. The return made by the company to the Commission was in error in that certain sums were reported as original cost of property devoted to public use which, in fact, were due to property devoted to non-utility operations. These amounts have been eliminated by the Commission.

The cash cost of the physical properties devoted to the public use by the Salem Water, Light & Power Company, on December 31, 1913, was as follows:

To April 30, 1911 (date of transfer from Salem Water Company to Salem, Water, Light & Power Company	$285,674.09
Additions and betterments made from May 1, 1911, to December 31, 1913, by Salem Water, Light & Pawer Company	104,814.29
Total cost of physical property	$390,488.38

Such additions and betterments were added to the plant as follows:

May 1, 1911, to December 31, 1911	$ 35,426.84.
1912	46,686.18.
1913	22,701.27.
Total.	$104,814.29.

The foregoing statement does not show or include the cost of the water rights for power purposes (approximately 150 horsepower) owned by the Company, nor its easement for head works and transmission line upon Minto Bar or Island. The records of neither the defendant nor its predecessor disclose the actual cost of such water power and easements; but by an inventory of the property of the Salem Water Company, Decem-

ber 24, 1891, the earliest record now available before the Commission, they were carried at a value of $35,000. The actual cost of such water power and easements cannot, therefore, be found by the Commission.

The foregoing estimate of original cost includes no allowance for any municipal franchise, or for development of the business, or so-called going concern cost, if any. No depreciation has been charged against the cost of the property in the foregoing figures. After giving consideration to the dates on which the various portions of construction were made, and to the expense of developing the business of the defendant's predecessor into a going concern during the early years of the enterprise, the Commission finds such expense of developing the business as was incurred during the early years of the Salem Water Company was fully amortized and repaid out of the operating income, and that since the transfer to the defendant there has been no deficit or shortage of returns from the operations, due to the development of business or extensions, or otherwise. The business of Salem Water Company, when acquired by Salem Water, Light & Power Company, was fully developed and profitable, and the expense of development of business upon the extensions of the defendant has been fully met as part of its operating expenses.

The consideration for the easement for headworks and transmission line on Minto Bar was the furnishing by the utility to the grantor, his heirs, etc., of certain water for domestic use; and the consideration for the granting of the franchise by the City of Salem was the furnishing of water free for specified municipal purposes.

The cost of furnishing the water called for by such municipal franchise and easement on Minto Bar has been and is now fully taken care of out of the operating expenses, and has been borne ratably by the various patrons of the defendant and its predecessor, as an operating expense.

7. The foregoing estimate of original cost does not include the cost of Lot 8 and the north 7 3-4 feet of Lot 7 in Block 36, in the City of Salem. In the return made by the Company to the Commission the property just described is stated to have cost $25,000. This tract is chiefly valuable for business purposes. Its use for public utility purposes is recent and only partial, and such use as is made of it could readily have been avoided, and now can be dispensed with by a slight rearrangement of the distributing mains of the defendant leading from its pumping station, and by making other arrangements for the storage of a cheap automobile used by the defendant. In the interests of economy in operation, such other arrangements should be made and this valuable property released from utility service. The property in question was not reasonably worth to exceed $5,000 when acquired, and at the present time is worth approximately $7,500. A fair estimate of the then value of the portion used for public utility purposes is $1,000, and such value has not since increased to any considerable extent.

It appears that the tract described was originally acquired by the Salem Water Company August 5, 1908, for $5,000 cash, paid to Edward Hirsch by that company. Title was taken, not in the name of the Com-

pany, but in the name of George Wolover, and no conveyance from him at that time appears in evidence. In January, 1911, the tract was taken out of the property account of the Salem Water Company, but no reimbursement for the advance made by the Company was made by anyone. The "warrants, stocks and bonds" account of the Salem Water Company was charged $5,000, but no detail or explanation of the transaction whatever is furnished by the books of the Salem Water Company. On August 31, 1912, this land was taken into the property account of the Salem Water, Light & Power Company, and its real estate account was charged with $25,000, and George Wolover was credited with a similar amount. The account remained in this condition until June 30, 1913 (after the filing of the complaint herein), when 6% bonds of the Salem Water, Light & Power Company to the amount of $25,000 were delivered to George Wolover to offset his credit. Interest was paid upon such bonds from the date of their issuance to Wolover out of the revenues from public utility operations of the defendant. The return of the Company made to the Commission states that the bonds so issued were issued for cash.

8. To reproduce the property of the defendant used and useful in its service as a public utility, in normal new and usable condition, including the material and supplies on hand, its water rights and easements employed in the public service, and including the portions of Lots 7 and 8 in Block 36 actually used in utility service, all considered as a going concern, on December 31, 1913, would have required the expenditure of approximately

$443,538. Such property has depreciated and falls below the standard of normal new and usable condition (taking into account the salvage value thereof) $70,796, and the reproduction cost new, lessened by such depreciation was, on December 31, 1913, $372,742.

The record shows there is necessary for working capital (aside from the plant) either cash or credit to an amount of $12,000.

9. Defendant's revenue, expenses, income, taxes, and operating profit from its utility operations, since its organization (making adjustments suggested by the stipulation of the parties filed), have been as follows:

	May 1, 1911, to Dec. 31, 1911	1912	1913
Operating Revenue	$43,590.89	$70,142.01	$78,519.79
Operating Expenses	17,614.40	33,489.14	33,783.91
Operating Income	25,976.49	36,652.87	44,735.88
Taxes	100.00	6,772.76	6,807.32
Operating Profits	$25,876.49	$29,880.11	$37,928.56

This statement of operating revenues and expenses, income and profit, does not take into account any increment in land values over the original cost of acquisition of the same, which increment has been considerable in amount.

Defendant has maintained no depreciation fund. It was the practice of the defendant to charge its replacements to operating expenses, and the plant was old enough and so well seasoned, when acquired by defendant, that replacements came with a fair degree of constancy, and hence depreciation has been taken care of out of operating expenses.

The operating profit above has been and is available

for payment of interest on the funded and other debts of the company and for the payment of dividends, and the sum of $35,385.50 was paid as a dividend to stockholders on June 30, 1913.

10. In the company's account has been charged the sum of $3,432.30 as being incurred during the years 1911 and 1912 on account of expenses incident to a proposed sale of the plant of the company to the City of Salem, and $500 during the year 1913 as expenses incident to this investigation. Such expense s are not ordinary expenses of operation. The expenses of this investigation should be properly pro-rated over a series of at least five years, and not charged to the operations of any single year; and the expenses connected with the negotiations for a sale of the defendant's property to the City of Salem should be charged to profit and loss account, and not to operating expenses.

Such extraordinary expenses have not been included by the Commission in its statement of operating expenses, income and profit, above set out.

11. The general expenses of the defendant for the management and superintendence of its properties include salaries paid to the president and vice-president at the rate of $4,800 per annum each. Such expense for management is unnecessarily high and considerably exceeds salaries paid for such services by any other similar utility in this State. The officers mentioned are not employed solely in the conduct of the defendant's public utility business, but to a certain extent their services are rendered in non-utility operations of the Salem Water Company and in other business ven-

tures, without any adjustment being made therefor. A reasonable sum to be expended by defendant for superintendence and management of its public utility operations would not exceed $3,000 per annum. By the practice of economy and reduction of such expense in the general management and operation of the defendant, it will be possible for it to increase its present operating profits at least $6,600 per annum; and the payment of any greater sum by the defendant to its managing officers than what a competent manager could be obtained for is an extra dividend from operating revenue.

12. The annual contribution to a reserve for accrued depreciation upon the public utility plant of the defendant (as such depreciation is defined in the Uniform Classification of Accounts prescribed by the Commission effective July 1, 1913) which should be set aside for such extraordinary replacements as are not taken into account as ordinary repairs, is the sum of $4,700.

13. Upon full consideration of the foregoing, and of all the evidence and proofs offered and received, the Commission determines that the value of the real and personal physical property of the respondent, together with its water rights and easements, stores and supplies on hand, all as actually used and useful in the service of the public, was the sum of $375,000, on the 31st day of December, 1913. Working capital or credit, other than stores and supplies, is additional to the sum so found.

14. The rates charged by the defendant are contained in its Tariff No. 1, filed with the Commission

January 15, 1913, with Supplements Nos. 1, 2, and 3, subsequently filed, which are referred to for greater particularity. Such rates are as follows:

FLAT RATES

(Per Month unless otherwise specified)

Bakeries, no rate less than	$2 00
Bath tubs—Private, first tub	50
Bath tubs—Private, each additional tub	25
Bath tubs—Public, and public buildings and blocks, hotels and boarding houses, barber shops, bath houses, first tub	1 00
Bath tubs—Public, each additional tub	50
Blacksmith shops, first fire	1 00
Blacksmith shops, each additional fire	25
Building purposes—Per 1,000 brick laid, including water for mortar	15
Building purposes—Wetting lime for other purposes than laying brick, per barrel	10
Building purposes—Wetting cement, per barrel	05
Building purposes—Wetting street pavement, per block	5 00
Cisterns, private, per 1,000 gallons	50
Dwellings—Four rooms or less, occupied by one family	75
Dwellings—Five to eight rooms, occupied by one family	1 00
Dwellings—Water closets, first	50
Dwellings—Water closets, each additional	25
Dwellings—Bath tub, first	50
Dwellings—Bath tub, each additional	25
Dwellings, Boilers for heating	2 00
Fishmarkets	1 50 to 2 00
Foundries	6 00 to 8 00
Fire protection—Special or private hydrant, 4-inch connection	4 00
Fire protection—Special or private hydrant, 3-inch connection	3 00
Fire protection—Special or private hydrant, 2-inch connection	2 00
Irrigation—Minimum, $4.00 per season:	
100 to 200 square yards, per square yard	01
Second 200 square yards, per square yard	.5–8c
All over 400 square yards, per equare yard	.1–2c
Washing sidewalks and windows during summer by use of hose, in addition to charge for other uses	50
Premises above 25 feet front subject to a proportional increase in rate.	
Lodges, each (Water closets and urinals extra)	1 00
Offices	50
Photograph galleries	$2 00 to 5.00
Printing Offices and bookbinders	1 50 to 5 00
Public halls and theaters	2 00 to 5 00
Stores—Drugs	2 00
Stores—Grocery	1 00
Stores—Dry goods	1 00

Slop hoppers	5 00
Urinals—Self closing, private	25
Urinals—Self closing public	50
Water closets—Private, first	50
Water closets—Private, each additional	25
Water closets—Public, first	1 00
Water closets—Public, each additional	50
Water closets—One for two families	1 00
Watering carts, per hour	20

10 % discount allowed on all flat rate bills (fire service excepted) paid on or before 10th of current month, and on flat rate irrigation bills paid on or before June 10 of the current year, provided the customer is not delinquent in payment of any such bill.

Public buildings—State, county and government; railroad; automatic water closets and urinals—meter rates.

METER RATES

Quantities used in any one month, without discount; per 1,000 gallons:	
First 15,000 gallons	$0 25
Next 15,000 gallons	20
Next 90,000 gallons	15
Next 130,000 gallons	10
Quantities exceeding 250,000 gallons	05
Minimum charge per month:	
5–8 or 3–4-inch meter	$1 80
1-inch meter	2 25
1 1-2-inch meter	3 00
2-inch meter	3 75
3-inch meter	5 00

The rates of defendant named do not bear equitable and ratable upon the various classes of consumers, and result in the imposition of charges which are unjust and unreasonable and unjustly discriminatory as between various classes of consumers served by the defendant.

It is also apparent that due to lack of inspection by defendant or otherwise, the tariff rates of defendant have not been and are not followed in many cases, but that some customers (other than those permitted by law to receive preferential rates) have been and are charged rates less than those provided in defendant's schedules and others have been charged more than tariff rates.

The rates named in defendant's schedules are higher than the rates for water customarily allowed in towns and cities of like population on the Pacific Coast, and are such that they yield to the owner of such public utility plant an undue return both upon the actual investment of the owners therein and upon the entire fair value of such plant.

15. In order that the charges made by the defendant to the various classes of its customers shall be fair and relatively equitable, and not unjustly discriminatory as between the different classes of its patrons, the various water users should be classified, and the following classification of water users is hereby found to be just and reasonable:

CLASSIFICATION OF WATER USERS

NOTE 1.—Customers in Classes A or B may elect in writing, or the utility may elect, to waive the rates applicable to those classes under Schedule 1, and have installed a meter; and in that event Schedule 2 will govern, instead of the flat rates applicable to Classes A and B in Schedule 1. The utility will not be required to install more meters per month upon such customers' demands than 2% of the total number of unmetered customers who by the terms of these rules are entitled to demand meters in the city served, and shall fill demands in the order of application. The utility shall not be required to bear the expense of installing a meter at a customer's request, under this provision, on a street which has not been brought to established grade.

NOTE 2.—The effect of the naming of an exception to the classification or of a specific rate applicable generally to a particular form of service, is to supersede the classification as to such form of service, whether the exception or specific rate so named exceeds or is less than the rate under the classification.

CLASS A

Apartments occupied by one family.
Art goods stores.
Banks.
Blacksmith shops.
Boat houses.
Carpenter shops.
Churches.
Cigar stands (alone, not with billiard halls or saloons).
Clothing and furnishing stores.
Crockery.
Department stores.
Harness shops.
Jewelry shops.
Lodge halls (not club rooms).
Lumber yards.
Millinery stores.
Offices, private, not otherwise specified, in which water is used only incidentally for convenience of occupants.
Paint shops and stores.
Plumbing shops.
Shoe stores.

Dressmakers' shops.
Dry goods stores.
Dwellings and appurtenant buildings, occupied by one family.
Electric appliance shops.
Fitters' shops.
Flats occupied by one family.
Fuel yards.
Furniture stores.
Gas appliances shops.
Hardware stores.
Stationers' shops.
Stores and shops, not otherwise specified, in which water is used only incidentally for convenience of occupants or customers (including small stands operated as part residence).
Tailor shops.
Tin shops.
Undertaker's parlors.

CLASS B

Bakeries.
Barber shops.
Baths (public).
Billiard halls.
Blue printers.
Boarding houses.
Boiler works.
Bowling alleys.
Butcher shops.
Club rooms.
Confectioner's shops.
Dentist's offices.
Drug stores.
Depots, railways (passenger and freight).
Florists.
Flour and feed mills.
Foundries.
General merchandise.
Grocery stores.
Iron and steel works.
Liquor stores (wholesale without bar).
Livery stables.
Machine shops.
Manufactories, not otherwise specified, in which water is essential in business carried on.
Marble works.
Photograph galleries.
Planing mills.
Printing shops.
Restaurants.
Sheet metal works.
Stores and shops, not otherwise specified, in which water is essential in business carried on, or generally used by customers or the public.
Theaters.

CLASS C

Apartments and flats under single customer's contract.
Breweries.
Brick and tile works.
Building, construction (see exception to classification).
Cider factories.
Colleges.
Construction, buildings, public works, etc.
Creameries.
Dairies.
Docks and warves.
Dye works.
Elevators, hydraulic.
Garages, public.
Greenhouses.
Hospitals.
Hotels.
Ice and cold storage plants.
Laundries.
Office buildings under single customer's contract.
Packing plants.
Pickling works.
Public buildings or works (see exception to classification).
Railroad shops.
Saloons.
Sawmills.
Schools.
Steamboats and steamships (see exceptions to classification).
Tanneries.
Vinegar factories.
Woolen mills.

16. Just and reasonable rates to be charged, imposed and collected by the defendant from the water users supplied by it, and regulations governing such service

are the following, in lieu of the existing rates and charges of the defendant, which existing rates and charges and all rules and regulations of defendant in respect thereto are hereby found to be unjust, unreasonable and unjustly discriminatory in so far as the same differ from the rates, charges and regulations in this finding set out, viz.:

RATES APPLICABLE TO WATER USERS

ACCORDING TO CLASSIFICATION PRESCRIBED

SCHEDULE 1—CLASSES A AND B

Rates per month in advance.

	Class A	Class B
First fixture	$ 70	$1 05
Additional faucets, for bowls, sinks, etc, not otherwise specified.	10	25
NOTE.— Under the foregoing headings are not included drain-cocks, sill cocks, etc., which are used for lawn or garden sprinkiling; hot water faucets in set with cold water faucets at same location when the latter are counted; barn irrigating, garage and other faucets, the principal function of which is to supply the water for services hereinafter in this schedule described, which are paid for by the customer at flat rates. Stationary wash tubs in sets at the same location count as one additional faucet.		
Baths	20	75
Additional baths, each	20	75
Toilet	40	75
Additional toilets, each	25	50
Urinal, single fixture, or per 2ft. length, each	40	75
NOTE.— The foregoing rates are based on the normal use of the service by an everage number of eight users or less. Increase the above rates 10 per cent for each five normal average users above eight in number.		
Automobiles, kept on premises	20	20
Barber's chairs after first, each		25
Dentist's fountain		75
Horses and cows, each	20	20
Sprinkling lawns and gardens, also outside of industrial plant through common small hose with nozzle or lawn fountain, first 3,000 sq. ft. or less (building space included). Payment of four months in advance allows use for 12 months in advance.)	60	60
Do, each additional 1,000 sq. ft. (upon same terms)	15	15
Sillcocks for washing store fronts	25	25

Bubbling or spray fountains, constant flow	1 00	1 00
Bubbling fountain, intermittent flow	50	50

NOTE.— Rates in Schedule 1 are subject to a discount of 10 per cent when paid on or before the tenth of the current month, provided the customer is not at the time delinquent in the payment of such bill.

SCHEDULE 2—CLASS C

Water delivered through meters, of any size, in one month:

	Per 100 cu. ft.
First 200 cu. ft.	$ 40
Next 300 cu. ft.	25
Next 1,500 cu. ft.	15
Next 14,000 cu. ft.	12
Next 20,000 cu. ft.	07 1-2.
All over 36,000 cu. ft.	05

Minimum charges, according to size of consumer's service pipe and meter employed, per month:

Size of service pipe	Corresponding size of meter	Minimum charge
3-4 inch	5-8 inch	$ 1 20
1 inch	3-4 inch	1 75
1 1-4. inch	1 inch	2 60
1 1-2. inch	1 1-2. inch	3 90
2 inch	2 inch	7 00
3 inch	3 inch	12 00
4 inch	4 inch	19 00

If size of meter employed does not correspond with size of pipe as per above table, apply whichever minimum is lowest. Example: With 3-4-inch meter used in connection with 3-4-inch pipe, the minimum on 3-4-inch pipe controls, rather than the minimum on 3-4-inch meter.

EXCEPTIONS TO CLASSIFICATION

Construction of public works, buildings, etc., 1 1-2 times Schedule 2 rates, without monthly minimum.

On small construction jobs, or where setting of meter is impracticable, use estimated quantities.

SPECIFIC RATES

	Per month
Steam or hot water heating furnaces connected with service, in residences and churches	$ 25
Do, other installations, per 1,000 sq. ft. of floor space (minimum 25c per month)	10
Steamboats and steamships: Schedule 2 applies only when supply is through regular service covered by usual contact. Irregular service, double Schedule 2 rates will apply, without minimum.	
Municipal fire hydrants, each	2 50
Fire protection standpipes, inside buildings, and private hydrants—	
2-inch or less connection	2 00
3-inch connection	3 00

4-inch connection..... 4 00

Subject to a discount of 10 per cent on all specific rate bills except fire service when such bills are paid on or before the tenth of the current month, provided the customer is not delinquent in payment of his bill.

17. By resolution of the Common Council of the City of Salem, adopted March 16, 1914, and filed with the Commission March 18, 1914, it was resolved that the Commission, in adjusting the rates of the defendant for private users, should take into consideration the price at which hydrants should be charged to make an equitable rate for the private user, and that if the rate presently charged the City for hydrants by the defendant should be too high or too low, it be adjusted accordingly.

Pursuant to such request and from the record before it, the Commission finds the rate charged by defendant to the City of Salem for fire hydrants and cisterns is insufficient as compared with the charges made to private users, considering the relative demands of the service and the amount of investment on account of the City and private consumers, respectively; and that the present hydrant rate, $1.82, casts an undue burden upon other users than the City. The effect of such unduly low rate is that patrons who use water have been compelled to pay and now pay more than a reasonable rate for their service to make up the deficiency in returns for service to the City from which they derive no benefit that is not equally shared by taxpayers and property owners who are not patrons of defendant. A just and reasonable hydrant rental is the sum of $2.50 per hydrant per month. In adjusting the schedule of rates for private water users above prescribed, the ac-

tion of the Common Council of the City of Salem, and this finding as to a reasonable rate for hydrants, have been taken into consideration by the Commission.

The action of the Common Council of the City of Salem does not in terms contemplate any waiver of the franchise provision as to the furnishing of water for the other purposes required by the franchise, and the rates prescribed by the Commission for private users have been fixed in contemplation of the continuance of the free service afforded the City in return for the franchise granted.

18. The complaint alleges the refusal of the defendant to make extensions into sections of the city which reasonably should be supplied by the defendant under its franchise and general duties as a public utility; and that in certain outlying districts the service afforded and pressure supplied are insufficient to furnish either satisfactory domestic service or any protection whatever against fire. The evidence adduced on behalf of the plaintiff City of Salem does not bear out these allegations of its complaint. Observations and tests made by the Commission, show that the past complaints as to inadequacy of pressure have been largely removed since the filing of the complaint herein, by betterments of the distributing system which have recently been made. The pressure complained of is chiefly during the sprinkling hours of the heated period during the summer, but such pressure now compares favorably with the service afforded generally by other water plants throughout the State, both municipal and privately owned.

19. It is the practice of the defendant to make the

following charges to patrons for connecting with its mains, including the opening of the main by the installation of a corporation cock or tee, namely:

1-2- inch opening	$ 1 00
1– inch opening	2 00
1 1-2- inch opening	5 00
2– inch opening	20 00
4– inch opening	40 00

In addition defendant requires its patrons to lay their own service mains and pipes from the mains of the defendant in the street to the point of application on the consumer's premises, notwithstanding the consumer has no franchise or rights to open or use the streets, and although the general practice of water utilities is to bring the water from the street main to the street property line of the patron.

This practice of the defendant is unreasonable and unjust. A just and reasonable practice is for the defendant to make the connection between its distribution mains and the services of its customers, and to furnish the necessary service main from its distribution main to the street property line of each consumer.

20. By tariff regulation the defendant claims the right at any time to attach meters to the service pipes of patrons at such places, and at such places only, as it may deem best, and to charge for the quantity of water measured, or used, at the meter rates carried by its tariffs, if the same exceed the flat rate application, but in any event to exact as a minimum the flat rate provided by its tariffs. This regulation of the defendant is unjust and unreasonable and unjustly discriminatory against patrons so arbitrarily placed on metered ser-

vices. A just and reasonable regulation and practice for the defendant to follow in the future is, in event it has a meter installed, to charge, impose and collect rates based upon the metered service schedule only, subject to the minimum for metered service, and without reference to flat rates.

21. Defendant in its tariff carries a provision as follows:

> "Water required for purposes which are not specified in the above tariff, the rate shall be fixed by the superintendent, who will, upon personal examination of the premises of any applicant for water, fix upon its rate; his decision being subject to modification by the Board of Directors of the Salem Water, Light & Power Company. The right is reserved by the Directors to amend or add to these rules and regulations, or to change the water rate as experience may show to be necessary or expedient without notice."

So far as the foregoing regulations of defendant provide for the charging, demanding, or collecting of rates other than those contained in the regularly published and filed tariffs of the defendant, or established by order of this Commission; and so far as the defendant attempts to reserve the right to change any of its rates without the notice required by law, the same are unlawful, unreasonable, and unjustly discriminatory.

22. The defendant maintains two suction pipes from its intake on Minto Island to its pumping station on the mainland, which pass for a considerable distance, under slack water of the Willamette River, contaminated with

sewerage. Only one of these suction pipes is employed at the present time, and the other was constructed for use in event of leakage in the used pipe or other emergency. By the genearl rules of the Commission relating to the Standards of Quality and other service conditions of water utilities in the State of Oregon, the Commission's File U-F-61, effective July 1, 1914, entered in a proceeding wherein the defendant was a party, it was ordered:

> "Rule 27. *Purity of Water Supply for Domestic Purposes.* (a) Each water utility delivering water for domestic purposes shall furnish a supply which shall at all times be free from injurious physical elements and disease-producing bacteria, and shall cause to be made such tests and take such precautions as will insure the constant purity of its supply. A record of all tests and reports pertinent to the water supply shall be kept in accordance with Rule 3."

The Commission is of the opinion that a necessary precaution to insure the constant purity of the supply of water furnished by the defendant is that defendant shall test the entegrity of each of its pipes at least quarter annually, by closing the valve at the intake and reversing the pressure under gauge to determine whether any leakage exists, which would result in contaminated water finding its way into the mains when the pipes are under suction. Oral suggestions have been made to the officers of the defendant that this precaution be taken, but the defendant has neglected and declined to make such tests. This question is not formally at

issue in this proceeding, under the complaint filed by the City, hence no formal order as to such test is within the jurisdiction of the Commission in the present case, although the facts as to the conditions of the suction pipes appear of record. However, the Commission renews its recommendation, and now requires the defendant to answer thereto within ten days from the date of the service of a copy of this order upon it, and to show cause, if any it has, why such tests should not be so made by it.

WHEREFORE. IT IS ORDERED, CONSIDERED, AND DETERMINED, that the defendant shall cease and desist from making, imposing and charging the rates and charges now made and imposed by it under the provisions of its Tariff O. R. C. No. 1, together with its Supplements Nos, 1, 2 and 3 thereto, in as far as the same differ from the rates herein found to be just and reasonable, and that the defendant shall classify its water users according to the classification hereinbefore found to be just and resonable and non-discriminatory, and shall hereafter impose and collect the charges in the schedule hereinbefore found to be just, reasonable, and not unjustly discriminatory, without personal discrimination between its patrons other than as expressly permitted by law, and that defendant shall in the future follow and observe the practices hereinbefore found to be reasonable and just in lieu of those found to be unjust and unreasonable. This order shall be in full force and effect October 1, 1914. A copy of this order shall be immediately served upon the plaintiff and the defendant, and prior to the date the same becomes fully effective,

defendant shall publish and file with the Commission new schedules in lieu of its existing schedules, embodying the rates and practices herein prescribed. As hereinbefore provided, defendant is required to make answer as to the testing of its suction pipes, in writing, within ten days from the date of the service of a copy hereof upon it.

Dated at Salem, Oregon, this 19th day of August, 1914.

RAILROAD COMMISSION OF OREGON
by FRANK J. MILLER,
THOS. K. CAMPBELL,
CLYDE B. AITCHISON,
Commissioners.

SEAL

Attest:
H. H. COREY,
Secretary.

EXHIBIT "C"

1914	October	148	$269.36
"	November	155	282.10
"	December	157	285.74
1915	January	157	285.74
"	February	157	285.74
"	March	157	285.74
"	April	157	285.74
"	May	157	285.74
"	June	159	289.38
"	July	163	296.66
"	August	166	302.12
"	September	166	302.12

1915	October	167	303.94
"	November	167	303.94
"	December	167	303.94
1916	January	167	303.94
"	February	167	303.94
"	March	167	305.76
"	April	168	305.76
"	May	168	305.76
"	June	168	305.76
"	July	168	305.76
"	August	168	305.76
"	September	176	320.32
"	October	176	320.32
"	November	176	320.32
"	December	176	320.32
1917	January	176	320.32
"	February	176	320.32
"	March	176	320.32
"	April	176	320.32
			$9373.00

STATE OF OREGON
County of Marion, ss.

I, W. E. Keyes, being first duly sworn, depose and say that I am one of the defendants in the above entitled cause; that I am familiar with the contents of the within answer, and that the facts therein alleged are true, as I verily believe.

(Sgd) W. E. KEYES,
Mayor of the City of Salem.

Subscribed and sworn to before me this 26th day of January, 1918.

(SEAL) (Sgd) G. E. UNRUH
Notary Public for Oregon.

My commission expires January 24th, 1920.

Due and legal service of the within answer at Portland, Oregon, by certified copy thereof, is hereby admitted on this 13th day of February, 1918.

(Sgd) M. M. MATTHIESSEN,
of Attorneys for Plaintiff.

And afterwards, to-wit, on the 18th day of February, 1918, there was duly filed in said Court, a demurrer to the amended answer in words and figures as follows, to-wit:

DEMURRER TO AMENDED ANSWER.

Comes now the plaintiff and demurs to all the Affirmative matter set out in paragraphs numbered II to IX, both inclusive, of the amended answer herein, and also to all of the further and seperate answers and defenses contained in said amended answer of the defendants herein, upon the ground that said defendants in said affirmative matter set out at large in said paragraph numbereds II to IX, both inclusive, and in said three further seperate answers and defenses, and in each and all of them, fail to state facts sufficient to constitute a defense to the cause of action set out in the complaint herein as amended.

Upon the argument of this demurrer, counsel for the plaintiff will contend as follows:—

1. The first further and seperate answer and defense is insufficient insofar as it sets up an alleged impairment of the obligations of a contract, because the franchise granted to plaintiff's assignor by the City of Salem was granted subject to the possible future exercise of the rate making power and of the police power by the State of Oregon, and that said rate making and police power did remain, and still is vested, in the legislature of the State of Oregon, because there was no delegation by the legislature to the City of Salem of the power to contract away for the time being the right to regulate rates in the future; that the giving of said franchise was not ratified by Chapter 80 of the laws of Oregon for the year 1911, and that said further separate answer and defense is insufficient insofar as it sets up a violation of section 1 of the XIV Amendment to the Federal Constitution, because it fails to specify any violation thereof and further because Chapter 279 of the laws of Oregon for the year 1911 is not in violation of the provisions of the XIV Amendment to the Federal Constitution, or of the Constitution of Oregon.

2. The second further and seperate answer and defense is insufficient, first, because the regulation of rates is not a matter of purely local or municipal concern, and secondly, because if the regulation of rates were a matter of municipal concern the legislature of the state has, and in 1911 did have, power to pass general laws affecting the charters of cities and towns.

3. The third further and separate answer and defense is insufficient because Chapter 279 of the laws

of Oregon for 1911 is not in violation of section 10 of Article I of the Federal Constitution, or section 21 of Article I of the State Constitution, or of the XIV Amendment of the Federal Constitution, or section 2 of Article XI of the State Constitution; consequently, whether or not resolution numbered 1294 of the City of Salem is effective or not may be disregarded. In this connection, however, plaintiff will contend that there is, and was, no provision of law in the charter of the defendant municipality requiring that action of the sort thereby taken must be by way or ordinance

4. The matter set out argumentatively or by recital in paragraphs numbered II to IX, both inclusive, of the amended answer are insufficient, because of the various grounds hereinabove stated as to the first, second and third further and separate answers and defenses, and further because upon the proper construction of the franchise (Ordinance No. 207) it is clear that the stipulation as to the rate for hydrant service was not by way of condition, but at most a regulatory measure; that the Public Service Commission of Oregon, as established by Chapter 279 of the Laws of Oregon for the year 1911 as amended, had power to hear and determine the question of the reasonableness of the rates charged by plaintiff to the defendant for hydrant service and to fix such rate especially with the consent of the defendant municipality, as evidenced by resolution numbered 1294, and by the filing of the complaint before the Public Utility Commission, appended as an exhibit to the amended answer herein; and Chapter 80 of the laws of 1911 was

not a ratification by the legislature of the action taken by the city of Salem in the enactment of Ordinance No. 207 and the ordinances supplemental thereto.

Dated this 16th day of February, 1918.

WOOD, MONTAGUE, HUNT & COOKINGHAM
M. M. MATTHIESSEN
Attorneys for Plaintiff.

I hereby certify that in my opinion the foregoing demurer is well taken in law.

M. M. MATTHIESSEN,
Of Attorneys for Plaintiff.

Service of the within demurrer by certified copy, at Salem, Oregon, is hereby admitted this 18th day of February 1918.

WM. P. LORD,
Of Attorneys for Defendants.

Filed February 18, 1918. G. H. Marsh, Clerk.

And aterwards, to-wit, on Monday, the 25th day of February, 1918, the same being the 96th Judicial day of the Regular November Term of said Court; Present, the Honorable Robert S. Bean, United States District Judge presiding; the following proceedings were had in said cause, to-wit:

ORDER SUSTAINING DEMURRER TO AMENDED ANSWER

This cause came on regularly for hearing the 25th day of February, 1918, before the Hon. Robert S. Bean, a Judge of the above entitled court, upon plaintiff's

able, and asking the Commission to make a valuation of the Company's property and to adjust and equalize the rates to be charged by it so that the same shall be equal and uniform and afford the Company a reasonable return upon its investment. Subsequently and while the matter was pending before the Commission, the City Council adopted a resolution declaring that the Commission in adjusting the rates for private uses, shall take into consideration the rates which should be charged for hydrants so as to make an equitable rate for the private user, and if the rate now charged the City is too high or too low that it be adjusted accordingly, and the City Recorder was instructed to send a copy of the resolution to the Commission. The resolution was duly filed with the Commission and thereafter there was a full hearing before the Commission on all matters mentioned and referred to in the petition and resolution, and the Commission among other things found that the rate specified in the company's franchise for hydrants was an undue burden upon the users of water other than the City and compelled them to pay more than a reasonable rate for their service, and thereupon it fixed and decreed the rate to be charged the public and the City, ordering that the City should pay two-dollars and fifty cents ($2.50) per month for hydrant service. The order became effective October 1, 1914. Thereafter the company continued to furnish water for hydrants and the same was accepted by the City, but it has refused to pay for the same in excess of the franchise rate, and hence this action.

The position of the City is that the rate to be charged for fire hydrants as stipulated in the franchise granting the Water Company the right to use the streets of the City constituted a contract between it and the Company which could not be impaired by subsequent State action. A municipal corporation is a political subdivision of a state existing by virtue of the exercise of legislative authority and while it may own property not of a public or governmental nature which is entitled to the constitutional protection, there is authority for holding that a contract between it and a public service corporation based on accepted conditions in a municipal ordinance granting to such corporations a right to use and occupy streets of the City is not private property beyond the control of the state, and that the state has the same right to change or modify such contract with the consent of the grantee that the city would have. (Worcester vs. Worcester Con. St. RR., 196 U. S. 539.) But assuming that the Public Service Commission had no power or authority to change the franchise rates on its own initiative, or upon the petition of some third party, it clearly had a right to do so by the consent of the City and such consent was manifest when it voluntarily invoked the power of the Commission to readjust the rates to be charged by the Water Company to the general public and itself, so as to make such rates equitable and reasonable to all parties. Having done so, it cannot now challenge the order of the Commission as far as it is affected because it is in violation of the contract with the Water Company. The Public Service Commission has jurisdiction over

the rates to be charged by a public utility and power to regulate and fix such rates. Portland R. L. &. P. vs. Portland, 201 Fed. 119; Cal.-Ore. Power vs. Grants Pass, 203 Fed. 173; Portland R. L. & P. vs RR Com. 229 U. S. 397; Portland R. L. & P. vs. RR Com., 56 Ore. 468; Woodburn vs Public Service Com., 82 Ore. 114.) When therefore the City petitioned the Commission to examine into and readjust the rates to be charged by the plaintiff to itself and the general public so as to make such rates fair and reasonable it thereby waived any rights it might have under its contract with the plaintiff and submitted the entire matter of rates to a competent tribunal having jurisdiction of the subject matter. It cannot now set up that the order which was invited by it and the natural result of its own action impaired the contract between it and the company. (Franscioni vs. Soledad L. & W. Co., 149 Pac. 161; New Orleans vs. N. O. Water Works, 142 U. S. 79.)

The demurrer is therefore sustained.

And afterwards, to-wit, on the 26th day of February, 1918, there was duly filed in said Court, Motion for Judgement upon the Pleadings, in words and figures as follows:

MOTION FOR JUDGMENT UPON THE PLEADINGS

Comes now the plaintiff by its attorneys, Messrs. Wood, Montague, Hunt & Cookingham, and moves this court for a judgment upon the pleadings in accordance with the prayer of its amended complaint.

This motion is based upon the pleadings in this cause and the record herein, including the refusal of the defendants to plead further upon the sustaining of the demurrer to their amended answer herein.

WOOD, MONTAGUE, HUNT and COOKINGHAM,
Attorneys for Plaintif.

Service of the within Motion by certified copy, at Portland, Oregon, is hereby admitted this 26th day of February, 1918.

(Sgd) WM. P. LORD,
of Attorneys for Defendants.

And afterwards, to-wit, on Monday the 4th day of March, 1918, the same being the 1st Judicial day of the regular March Term of said Court; Present: the Honorable Robert S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

In the District Court of the United States for the District of Oregon

JUDGMENT ORDER

SALEM WATER, LIGHT AND POWER COMPANY, a corporation,
Plaintiff,
vs.
THE CITY OF SALEM, a municipal corporation, WALTER E. KEYES, its Mayor, and C. O. RICE, its Treasurer,
Defendants.

This cause came on regularly for hearing this 4th day of March, 1918, before the Hon. Robert S. Bean, a Judge of the above entitled court, upon plaintiff's motion for a judgment herein upon the pleadings. Plaintiff was represented by its attorneys, Messrs. Wood, Montague, Hunt & Cookingham.

It appearing to the court that all the defendants, acting through their attorneys, B. W. Macy and Wm. P. Lord, did heretofore file an amended answer herein to the affirmative matter of which the plaintiff interposed a demurrer, and that said demurrer having been sustained, the defendants, by their counsel, in open court declined to plead further, and that plaintiff is entitled to a judgment in this cause as prayed for upon the pleadings and issues made by said answer to the amended complaint herein.;

NOW, THEREFORE, IT IS CONSIDERED, ORDERED AND ADJUDGED that plaintiff have and recover of and from the defendant, the City of Salem, a municipal corporation organized and existing under and by virtue of the constitution and laws of the State of Oregon, $12,810.88 and the further sum of $602.11, being interest on said principal sum of $12,810.88 at the rate of six per cent. per annum from May 21st, 1917, together with its costs and disbursements herein taxed at $39.55.

Done in open court this 4th day of March, 1918.

R. S. BEAN,
District Judge.

Filed March 4th, 1918. G. H. March, Clerk.

And afterwards, to-wit, on the 22nd day of May, 1918, there was duly filed in said court, and cause, a Petition for Writ of Error, in words and figures as follows, to-wit:

In the District Court of the United States for the District of Oregon

PETITION FOR WRIT OF ERROR

SALEM WATER, LIGHT & POWER COMPANY, a corporation,

Plaintiff

vs.

THE CITY OF SALEM, a municipal corporation, WALTER E. KEYES, its Mayor, and C. O. RICE, its Treasurer,

Defendants.

The City of Salem, a municipal corporation, Walter E. Keyes, its Mayor, and C. O. Rice, its Treasurer, defendants herein say that on the 4th day of February, 1918, this court entered judgment herein in favor of the plaintiff and against the defendants for the sum of $12,810.88, interest $602.11 and costs and disbursements in said action taxed at $39.55 in which judgment and proceedings had prior and subsequent thereto in this cause certain errors were committed to the prejudice of these defendants, all of which will more fully appear in detail from the assignment of errors which is filed with this petition.

WHEREFORE, defendants pray that a writ of error may issue in defendants' behalf to the United

States Circuit Court of Appeals for the Ninth Circuit for the correction of errors so complained of. and that a transcript of the record and proceedings and papers in this cause duly authenticated may be sent to said Circuit Court of Appeals.

B. W. MACY,
WM. P. LORD,
Attorneys for Defendants.

United States of America,
ss
District of Oregon

Service of the within petition for writ of error, and the receipt of a duly certified copy thereof, at the City of Portland in the District of Oregon, is hereby admitted.

WOOD, MONTAGUE AND HUNT,
Attorneys for Plaintiff.

And afterwards, to-wit, on the 22nd day of May, 1918, there was duly filed in said court, and cause, an Assignment of Errors, in words and figures as follows, to-wit:

In the District Court of the United States for the District of Oregon

ASSIGNMENT OF ERRORS

SALEM WATER, LIGHT & POWER COMPANY, a corporation,
Plaintiff
vs.
THE CITY OF SALEM, a municipal corporation, WALTER E. KEYES, its Mayor, and C. O. RICE, its Treasurer,
Defendants

Defendants above named in connection with this petition for writ of error in the above entitled action, suggest that there was error on the part of the District Court of the United States for the District of Oregon in regard to the matters and things hereinafter set forth, and defendants make assignment of errors as follows:

I

The Court erred in sustaining plaintiff's demurrer to defendants' amended answer.

II

The Court erred in sustaining plaintiff's motion for default judgment against the defendants.

III

The Court erred in sustaining plaintiff's motion for judgment on the pleadings and entering judgment thereon.

IV

The Court erred in entering judgment in this cause in favor of the plaintiff and aginst the defendants.

V

The Court erred in allowing any sums of money as interest on the amounts demanded in the complaint and entering judgment therefor.

Each of the foregoing assignments of error are based upon the grounds and for the reason that the same

action is contrary to law and decisions of the courts.

WHEREFORE, the said defendants, defendants in error, pray that the judgment of the District Court of the United States for the District of Oregon in the above entitled cause be reversed, and such directions be given that full force and efficiency may inure to defendants by reason of the facts set out in its answer filed in this cause.

B. W. MACY,
WM. P. LORD,
Attorneys for Defendants.

United States of America,
District of Oregon,—ss

Service of the within Assignment of Errors, and the receipt of a duly certified copy thereof, at the City of Portland in the District of Oregon, is hereby admitted.

WOOD, MONTAGUE AND HUNT
Attorneys for Plaintiff.

And afterwards, on the 22nd day of May 1918, there was filed in said cause an order allowing writ of error and fixing bond in words and figures as follows:

ORDER ALLOWING WRIT OF ERROR AND FIXING BOND

On this 22nd day of May, 1918, the above named defendants, by their attorneys, Wm. P. Lord and B. W. Macy, filed herein and presented to the Court petition praying for the allowance of a writ of error intended to be urged by defendants, and praying also that the transcript of the record and proceedings and papers upon the judgment herein so rendered on the 4th day

of February, 1918, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial District, presenting therewith assignment of errors, and also praying that an order may be made fixing the amount of an undertaking on writ of errors, and for such other and further proceedings as may appear proper in the premises.

On consideration thereof the Court does hereby allow the writ of error and fixes the amount of said bond in the sum of Three hundred and fifty dollars ($350.00).

This bond is fixed pursuant to a stipulation filed in this cause waiving on the part of the plaintiff a supersedeas bond, and is conditioned that the defendants shall prosecute said writ of error in accordance with said stipulation, and to affect and answer all damages and costs if it fails to make good its plea.

CHAS. E. WOLVERTON,
Judge.

Dated Portland, Oregon, May 22nd, 1918.

And afterwards, to-wit, on the 22nd day of May, 1918, there was duly filed in said court and cause, a bond, in words and figures as follows, to-wit:

BOND

KNOW ALL MEN BY THESE PRESENTS that we, the defendants above named, and particularly the City of Salem, a municipal corporation, duly organized and existing under and by virtue of the Laws of the State of Oregon, by Walter E. Keyes, its Mayor, and C. O. Rice, its Treasurer, and Wiebca C. Lord, a free-

holder within the County of Multnomah, and State of Oregon, are held and firmly bound unto the above named plaintiff, Salem, Water Light & Power Company, a corporation, in the sum of Three hundred fifty dollars ($350.00), for the payment whereof, well and truly to be made, the said defendants above named and said Wiebca C. Lord, bind themselves, their successors and assigns, jointly and severally by these presents.

Whereas, at a term of the Circuit Court of the United States for the District of Oregon, in an action pending in said Court between the above named plaintiff and defendants, a judgement was rendered against said defendants in favor of said plaintiff, and the said defendants have obtained a writ of error, and filed a copy thereof in the Clerk's office of said Court to enforce the judgemnt in the aforsaid action, and a citation directed to the said plaintiff admonishing it to be and appear before the next session of the United States Court of Appeals for the Ninth Circuit;

NOW THEREFORE the conditions of the above obligations are such that if the defendants above named shall prosecute said writ of error to effect and answer all damages and costs if it fails to make good its plea that the above obligation is void; otherwise the same shall be and remain in full force and virtue.

IN WITNESS WHEREOF said City of Salem, a municipal corporation, and the said Walter E. Keyes, and C. O. Rice have caused these presents to be exe-

cuted this 22nd day of May, 1918, by their duly authorized attorney, Wm. P. Lord.

CITY OF SALEM, a municipal corporation
WALTER E. KEYES, and
C. O. RICE.
By WM. P. LORD
WIEBKA C. LORD
Surety

The foregoing bond is approved.

CHAS. E. WOLVERTON,
Judge.

United States of America,
District of Oregon,—ss

I Wiebka C. Lord, being first duly sworn on oath depose and say; that I am surety on the within nndertaking, and that I am not counselor or attorney at law, sheriff, clerk or other officer of any court, and am worth the sum of One thousand dollars ($1000.00) over and above all property exempt from execution.

WIEBKA C. LORD,

Subscribed and sworn to before me this 22nd day of May, 1918.

WM. P. LORD,
Notary Public for the State of Oregon

My Commission expires Dec. 26, 1920.

United States of America,
District of Oregon,—ss.

Due service is hereby admitted of the within bond this 22nd day of May, 1918.

WOOD, MONTAGUE AND HUNT,
Attorneys for Plaintiff.

And afterwards, and on the 17th day of June, 1918, the following proceedings were had in said cause.

ORDER

Based upon a stipulation in this cause, and on good cause shown;

IT IS HEREBY ORDERED that the time of the above named plaintiffs in error within which to file the transcript of record and docket this cause in the Circuit Court of Appeals for the Ninth Judicial District, be and the same is hereby extended to and including the 6th day of July, 1918.

Dated June 17th, 1918.

CHAS. E. WOLVERTON
Judge.

And afterwards to-wit: on the 3rd day of July, 1918, the following proceedings were had in said cause to wit:

ORDER EXTENDING TIME

It appearing to the Court from the statement of counsel for plaintiffs in error that he is unable to stipulate with opposing counsel that a printed record tendered to the Clerk in this cause for his certificate is a true transcript as is provided by rule of the Court of appeals and that the Clerk of this court is unable to compare said printed record with the original on file in his office by reason of congestion of business before August 1st, 1918, and it satisfactorily appearing to the Court that an order should be made extending the

time of plaintiffs in error to file the transcript of record and docket this cause in the Circuit Court of Appeals for the Ninth Judicial District, to and including the 1st day of August, 1918.;

IT IS THEREFORE ORDERED AND ADJUGED that the time of the above named plaintiffs in error within which to file the transcript of record and docket this cause in the Circuit Court of Appeals for the Ninth Judicial District be and the same is hereby extended to and including the 1st day of August, 1918.

Dated July 3rd, 1918.

CHAS. E. WOLVERTON
District Judge.

United States of America
District of Oregon.—ss

I, G. H. Marsh, Clerk of the District Court of the United States, for the District of Oregon, do hereby certify that I have compared the foregoing printed transcript of record on writ of error in the case in which the Salem Water, Light & Power Company, a corporation, is plaintiff, and defendant in error, and City of Salem, a municipal corporation, Walter E. Keyes, its Mayor and C. O. Rice, its Treasurer, are defendants and plaintiffs in error, with the original in said cause and that the said transcript is a full, true and correct transcript of the record of proceedings had in said Court in said cause as the same appears of record on file at my office and in my custody.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Portland, in said district, this 24th day of July, 1916.

_____

Clerk.

No. 3198

IN

The United States Circuit Court of Appeals

For the Ninth Circuit

THE CITY OF SALEM, a municipal corporation, WALTER E. KEYES, its Mayor, and C. O. RICE, its Treasurer,

Plaintiffs in Error,

vs.

SALEM WATER, LIGHT & POWER COMPANY, a corporation,

Defendant in Error.

Brief of Plaintiff

Upon Writ of Error to the District Court of the United States for the District of Oregon

N. D. ELLIOTT, PRINTER, SALEM, ORE.

IN THE

The United States Circuit Court of Appeals

for the Ninth Circuit

THE CITY OF SALEM, a municipal corporation, WALTER E. KEYES, its Mayor, and C. O. RICE, its Treasurer,

Plaintiffs in Error,

vs.

SALEM WATER, LIGHT & POWER COMPANY, a corporation,

Defendant in Error.

NAMES AND ADDRESSES OF THE ATTORNEYS OF RECORD

Wood, Montague, Hunt & Cookingham, Yeon Building. Portland, Oregon, for the Defendant in Error.

B. W. Macy, Salem, Oregon,
Wm. P. Lord, Lewis Bldg., Portland, Oregon,
for the Plaintiffs in Error.

STATEMENT OF FACTS

The city of Salem was incorporated and granted a charter by an act of the Legislative Assembly of the State of Oregon, in the year 1862, approved October 21, 1862, and pursuant to Section II of Article XI of the Constitution of Oregon, approved by Congress in 1859.

The Constitutional provision was as follows:

> "Corporations may be formed under general laws, but shall not be created by special laws, except for municipal purposes. All laws passed pursuant to this section may be altered, amended. or repealed, but not so as to impair or destroy any vested corporate rights."

This act, and the subsequent amendatory acts of 1887, are not material to any issue in this case. It may be noted, however, that under the terms of the Charter granted the City of Salem, until the year 1889, the powers of the Common Council were so circumscribed that the city was powerless to grant an advantageous franchise to any water company furnishing the city and its inhabitants with water. The powers granted were "To provide the city with good, wholesome water" (Laws 1887, page 256). It was at the next session of the Legislature that the Charter was amended enlarging the powers of the Common Council so that the city had power to grant an advantageous franchise to a water company to supply the city and its inhabitants with water, and at the same time granting the right to in-

stall a municipal water works, and to fix water rates and tolls.

It may be further noted that denfendent in error's predecessors had in no sense an exclusive franchise. Under the Charter powers granted, the Common Council had the power to either construct its own water works, or purchase any existing private water plant engaged in supplying the city and its inhabitants with water under any franchise granted by the Common Council. It will be seen that under the terms of the franchise contract with the city, the power of municipal ownership was expressly provided for, hence no question of the validity of the franchise is involved in this action.

The act of 1899, amending the original and supplementary acts, (Special Laws 1889, et seq.) and the amendatory act of 1891 (Special Laws 1891, page 1088), are important as the rights of the respective parties to this litigation are derived from the provisions of these acts. The construction to be placed upon the Charter powers granted by these two Sessions of the Legislative Assembly, in view of Section II of Article XI of the Constitution of Oregon as it then existed, and the subsequent adoption of the "Home Rule Amendments", and the adoption of the Public Utility Law, brought about the controversy in this case.

Section 6 of the Charter of City of Salem was amended by the Legislative Assembly in the year 1891 (Oregon Laws 1891, page 1088), which took effect by virtue of an emergency clause on the 21st day of February, 1891, —not quite two months before the franchise granting to the Water Company's predecessors the right to use the

streets and alleys to supply the city and its inhabitants with water.

These sections, so far as they define the rights of the city, are as follows:

> "The mayor and aldermen shall comprise the common council of said city, and at any meeting shall have exclusive power—
>
> To provide for lighting the streets and furnishing the city and the inhabitants thereof with gas or other light, and with pure and wholesome water, and for such purposes may construct such water, gas or other works, within or without the city limits, as may be necessary or convenient therefor; provided, that the council may grant and allow the use of the streets and alleys of the city to any person, company or corporation who may desire to establish works for supplying the city and the inhabitants thereof with such water or light upon such terms and conditions as the council may prescribe.
>
> To permit, allow and regulate the laying down of tracks, street cars and other railroads upon such streets as the council may designate, and upon such terms and conditions as the council may prescribe; to allow and regulate the erection and maintenance of poles or poles and wires for telegraph, telephone, electric light or other purposes, upon or over the streets, alleys or public grounds of the city; to permit and regulate the use of the streets, alleys and

public grounds of the city for laying down and repairing gas and water mains, for building and repairing sewers and the erection of gas or other lights; to preserve the streets, alleys, side and crosswalks, bridges and public grounds from injury, and prevent the unlawful use of the same, and to regulate their use; to fix the maximum rate of wharfage, rates for gas or other lights, for carrying passengers on street railways, and water rates."

The Legislative Assembly in 1903, under the same constitutional provision, amended Section 6 by adding sudivision 41 (Laws 1903, page 359) as follows:

"The Mayor and Aldermen shall comprise the Common Council of said city, and at any meeting thereof shall have exclusive power:

To license, regulate, and tax telephone companies, telephone offices, and telephones, and to fix the maximum rate to be charged by telephone companies for the rental and use of telephones; to license, regulate, and tax water, gas, and electric light and power companies, and to fix the maximum rates to be charged by any person, company, or corporation for water, electric or gas light, or power, supplied by such person or company to private or public consumers within the city; to license, regulate, and tax express and telegraph companies; and to license, regulate, and tax bicycles, tricycles, tandems, and automobiles, and to reg-

ulate, control, or prohibit the use of any thereof on the streets of the city."

It may be noted that at this session of the Legislature subdivision 6 of Section 6 of the Charter, already quoted, was amended so as to read as follows:

> The Common Council may have power to contract for water and lights for city purposes, or to lease, purchase, or construct a plant or plants for water or light, or both, for city purposes, in or outside the city limits. The council of the City of Salem shall, at all times, under the limitations herein set out, have the power to provide, by ordinance, for lighting the streets, and all public and private places in the city, and furnishing water to the inhabitants thereof; to provide for the acquisition, ownership, construction, and maintenance of water works, gas works, electric light works, steam, water, or electric power works, heating works, telephone lines, street railways, bridges, and ferries, and such other public utilities as the council may designate, and to issue bonds therefor; Provided, however, no contract of (or) agreement for the purchase, condemnation, ownership, construction, or operation by the city of any public utility shall be entered into, nor bonds be issued therefor, by the council, without first submitting such proposed contract or agreement to the qualified voters of the city. * * (Provisions for submitting

question to voters omitted.) * * Provided, that the council may grant and allow the use of streets and alleys of the city to any person, company, or corporation who may desire to establish works for supplying the city and inhabitants thereof with such water or light upon such terms and conditions as the council may prescribe.

Pursuant to these provisions of the Charter the Common Council of the City of Salem, Oregon, passed an ordinance, which was approved on the 16th day of April, 1891, as follows:

"ORDINANCE NO. 207

An Ordinance providing for the laying down of pipes for water in the streets and alleys of the City of Salem, by the Salem Water Company.

Be it Ordained by the Common Council of the City of Salem, Oregon:

Section 1. (This section was amended by Ordinance No. 346, which ordinance is hereafter set out.)

Section 2. (Places Furnished Free). That the Salem Water Company, its successors and assigns, shall furnish the City of Salem, free of charge, with water for two fountains in Wilson Avenue and one in Marion Square, from the first day of May to the 31st day of October of

each year, and water for the use of all engine houses, rooms for firemen's meetings, the council chambers, the city prison, and all offices in the city buildings used by any of its officers or agents, and shall also furnish water for a public drinking fountain for man and beast at such place as may be designated by the Common Council.

Section 3. (Duties of Water Company: Pressure). The said Salem Water Company, their successors or assigns, shall at all times keep a sufficient supply of good, wholesome water in the distributing mains in the City of Salem to supply all demands upon them for water within said city. The said Salem Water Company, their successors or assigns, are hereby required, for the purpose of connecting hydrants, to tap their mains whenever and wherever required by the City of Salem, Oregon, and of any size demanded, not in excess of the size of the main tapped, and shall also make a proper connecting joint therefrom of inside measurement of at least the same size as the tap suitable and proper for connecting the hydrant main to, and keep it in repair and to lay mains to any part of the city, when needed or required by the City of Salem, for supplying hydrants erected or to be erected, but said mains shall not be less than four inches in diameter, inside measurement, without cost or charge to the city of Salem; and the pressure

of the water at each and all hydrants of the city, now erected or which may hereafter be erected west of east side of Twelfth street and south of north side of Division street, and north of south side of Mill street, shall be at least sixty pounds at any and all times.

Section 4. (Rates). The said Salem Water Company, their successors or assigns, shall not charge, at any time, higher rates for water than is customarily allowed for water in towns or cities of like population on the Pacific Coast but the Salem Water Company, its successors or assigns, shall not at any time charge more than one dollar and eight-two cents ($1.82) per month for each hydrant or cistern actually supplied. And the right is hereby reserved by the City of Salem to continue or discontinue, to connect or disconnect any or all hydrants or cisterns connected, or which may hereafter be connected, with said works; and the City of Salem shall not pay for said hydrants or cisterns, while the same are disconnected or discontinued.

Section 5. (Municipal Ownership not Prohibited) Nothing in this ordinance shall be so construed as to prevent the City of Salem from erecting, buying or owning or operating its own works, for the purpose of supplying the city and the inhabitants thereof, or either, with water at any time.

Section 6. (Company's Consent to Amend)

This ordinance shall not be altered, amended, or repealed without the consent of the said Salem Water Company, except for the violation by them of any of the provisions of this ordinance.

Section 7. (Time Limit for Acceptance). The Salem Water Company, their successors or assigns, shall file their acceptance of this grant in writing with the City Recorder within ten days after the passage of this ordinance. (Passed April 15, 1891. Approved April 16, 1891)."

This ordinance, with the consent of plaintiff's predecessor, was amended by an ordinance passed by the Common Council on the 12th day of April, 1898, reading as follows:

ORDINANCE NO. 346.

An Ordinance to amend Section 1 of an ordinance entitled "An Ordinance providing for the laying down of pipes for water in the streets and alleys of the City of Salem, by the Salem Water Company."

Be it Ordained by the Common Council of the Cith of Salem, Oregon:

Section 1. (Amendment). That Section I of an ordinance entitled "An Ordinance providing for the laying down of pipes for water in the streets and alleys of the City of Salem, by

the Salem Water Company," be and the same is hereby amended so as to read as follows:

"Section 1. That the Salem Water Company, a corporation organized and existing under the laws of the State of Oregon, and its successors and assigns, be and are hereby granted the right, privilege, and franchise for the period of fifty years to lay down pipes and keep them in repair along the streets and alleys of said city and to excavate the streets and alleys, but in the doing of any of said acts said Salem Water Company, its successors and assigns, shall be amendable and subject to all ordinances now in force or which may be hereafter enacted or ordained relative to the excavation of streets or alleys, and also all ordinances relative to the streets and the use thereof, and all ordinances in which the doing of the acts would contravene. All pipes shall be laid not less than twelve inches below the surface of the street or alley and also not less than twelve inches below the surface of the established grade of the streets or alleys in which the same may be located or laid, and whenever it may be necessary to disturb streets, alleys, sidewalks or crosswalks in construction or repairing the said works, they shall be replaced by the said Salem Water Company, their successors or assigns, with as little delay as possible and put them in the same condition as found. The Salem Water Company, its suc-

cessors or assigns, shall be liable for any damage or injury that may occur by reason of any of its acts to persons or property. The said grant of authority and permission being upon the following condition and stipulation, to-wit:"

Section 2. (Municipal Ownership Not Prohibited). Nothing in this ordinance shall be so constructed as to prevent the City of Salem from erecting, buying or owning or operating its own works for the purpose of supplying the city and the inhabitants thereof, or either, with water at any time.

Section 3. (Company's Consent to Amend) This ordinance shall not be altered, amended or repealed without the consent of the Salem Water Company, except for the violation by them of any of the provisions of this ordinance.

Section 4. (Time Limit for Acceptance). The Salem Water Company, their successors or assigns, shall file their acceptance of this ordinance as amended, in writing with the City Recorder within ten days after the passage of this ordinance, (Passed April 12, 1898. Approved April 16, 1898).

ACCEPTANCE BY THE SALEM WATER COMPANY.

To the Honorable Mayor and Common Council of the City of Salem, Oregon:

In pursuance of a resolution of the board of directors of the Salem Water Company, a corporation duly organized and existing under and by virtue of the laws of the State of Oregon, which resolution was passed by said board of directors on the 18th day of April, A. D. 1898, the Salem Water Company, through its president, J. M. Wallace, to which corporation saip rights and privileges were granted, hereby accepts Ordinance No. 346, of the City of Salem entitled "An Ordinance to amend Section I of an ordinance entitled 'An Ordinance providing for the laying down of pipes for water in the streets and alleys of the City of Salem, by the Salem Water Company.'"

Said ordinance having been passed by the Common Council of the City of Salem, April 12, A. D. 1898, and approved by the Mayor of said city on the 16th day of April, A. D. 1898.

(Signed) SALEM WATER COMPANR,
By J. M. Wallace, as President.

Dated the 18th day of April, A. D. 1898.
(Recorded, April 18, 1898).

Subsequent to the passage of Charter provisions

above set forth the Constitution of the State was amended by the adoption of the "Home Rule Amendment." These amendments were adopted at the general election held June 4, 1906, and became effective by proclamation of the Governor on June 25th, and are as follows:

Article XI, Sec. 2.

"Corporations may be formed under general laws, but shall not be created by the legislative assembly by special laws. The legislative assembly shall not enact, amend, or repeal any charter or act of incorporation for any municipality, city, or town. The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the constitution and criminal laws of the state of Oregon."

Article IV, Sec. 1a.

"The referendum may be demanded by the people against one or more items, sections, or parts of any act of the legislative assembly in the same manner in which such power may be exercised against a complete act. The filing of a referendum petition against one or more items, sections, or parts of an act shall not delay the remainder of that act from becoming operative. The initiative and referendum powers reserved to the people by this constitution are hereby further reserved to the legal voters of every municipality and district, as to all local, special, and municipal legislation, of

> every character, in or for their respective municipalities, and districts. The manner of exercising said powers shall be prescribed by general laws, except that cities and towns may provide for the manner of exercising the iniative and referendum powers as to their municipal legislation. Not more than ten per cent of the legal voters may be required to order the referendum, nor more than fifteen per cent to propose any measure, by the initative, in any city or town.

It is the established rule of construction in the State of Oregon that these two provisions having been adopted at the same time are to be construed together; State vs. Astoria, 79 Ore. 10; 154 Pac. 399 and authorities cited.

In 1911 the Legislative Assembly passed the Public Utility Act, found on page 483 of the 1911 Session Laws. As the act was referred to the people for approval or rejection at the ensuing general election, it did not becone effective until the 29th day of November, 1912. In Woodburn vs. Commission, 82 Or. 116, in construing this act, the Oregon Supreme Court say:

> "The Public Utility Act is similar to the legislation which has been adopted in most of the states, and confers upon the commission the power to regulate telegraph, telephone, street railroad, heat, light, water, and power plants so that a safe and adequate service may be rendered to the public at reasonable and

sufficient rates. The term "public utility" embraces every owner operating a telephone plant for the public "and whether said plant or equipment or part thereof is wholly within any town or city, or not:" Section I. Power to regulate public utilities is conferred upon a commission which was, at that time, called the Railroad Commission of Oregon (Section 6), but is now known as the Public Service Commission of Oregon: Laws 1915, p. 347. Every public utility is required to furnish adequate and safe service, and unjust or unreasonable charges are prohibited. The Commission may hold a hearing (Section 42), on the complaint of patrons that the rates being charged are unreasonable or unjustly discriminatory (Section 41), or on the complaint of any public utility "as to any matter affecting its own product or service" (Section 46), or an investigation may be made on the motion of the commission (Section 45); and "if upon such investigation, any rates * * shall be found to be unjust, unreasonable, insufficient or unjustly discriminatory * * the commission shall have power to fix and order substituted therefor such rate or rates, * * as shall be just and reasonable * *

(Section 43); and, furthermore, the commission "shall determine and by order fix reasonable rate or rates, * * in lieu of those found to be unjust, unreasonable, insufficient

or unjustly discriminatory * * (Section 51)."

Section 61 of the Public Utility act provides as follows:

> "Power of Municipality to Regulate Utilities; Appeal. Every municipality shall have power—
>
> (1) To determine by contract, ordinance or otherwise the quality and charactor of each kind of product or service to be furnished or rendered by any public utility furnishing any product of service within said municipality and all other terms and conditions not inconsistant with this Act upon which such public utility may be permitted to occupy the streets, highways or other public property within such municipality and such contract, ordinance or other determination of such municipality shall be in force and prima facie reasonable. Upon complaint made by such public utility or by any qualified complaint as provided in Section 41, the Commission shall set a hearing as provided in Section 42 and if it shall find such contract, ordinance or other determination to be unreasonable, such contract, ordinance or other determination shall be void. Provided, however, that no ordinance or other municipal regulation shall be reviewed by the Commission under the provisions of this section which was prior to such review enacted by the initiative or which was prior to such review re-

ferred to and approved by the people of said municipality or while a referendum thereon is pending.

(2) To require of any public utility by ordinance or otherwise such modification, additions and extensions to its physical equipment, facilities or plant or service within said municipality as shall be reasonable and necessary in the interest of the public, and to designate the location and nature of all such additions and extensions, the time within which they must be completed and all conditions under which they must be constructed subject to review by the Commission as provided in this section.

(3) To provide for a penalty for non-compliance with the provisions of any ordinance or resolution adopted pursuant to the provisions hereof.

(4) The power and authority granted in this section shall exist and be vested in said municipalities, anything in this act to the contrary notwithstanding.

The Legislative Assembly of the State of Oregon, on the 16th day of February, 1911, passed an Act known as

CHAPTER 80

"An Act Authorizing and empowering any incorporated city or town owning, controlling or operating a system of water works or electric light and power system for supplying

water or electricity for its inhabitants, and for general municipal purposes, and authorizing and empowering any person, persons, or corporation, operating or controlling any water or electric light and power plant under lease, contract or ownership, to sell, supply and dispose of water or electricity to individuals and corporations, within or without the corporate limits of such incorporated city or town, and to contract in reference thereto, and provide for the ratification of contracts made with persons or corporations concerning the same, prior to the passage of this act.

(Section 1 omitted).

Section 2. All contracts or agreements heretofore made, and now in effect for the sale and disposal of water or electricity, by incorporated cities and towns, and by any person, persons, or corporation, operating, controlling or owning water or electric light and power systems, to any person, persons or corporation within or without the limits of such incorporated city or town, in which such system is operated, are hereby ratified and declared legal and valid contracts, insofar as the right of such city or town to contract with reference to same is concerned."

Under Section 63 of the Public Utility Act it is provided as follows:

"Section 63. Unjust Discrimination, Pro-

hibited; Definition; Penalty; Permissible Free or Reduced Rate Service.—If any public utility or any agent or officer thereof shall, directly or indirectly, by any device whatsoever or otherwise, charge, demand, collect or receive from any person, firm or corporation a greater or less compensation for any service rendered or to be rendered by it in or effecting it relating to the transportation of persons or property by street railroad or to the production, transmission, delivery or furnishing of heat, light, water or power or the conveyance of telegraph or or telephone messages or for any service in connection therewith than that prescribed in the public schedules or tariffs than in force or established as provided therein, or than it charges, demands, collects or receives from any other person, firm or corporation for a like and contemporaneous service under substantially similar circumstances, such public utility shall be deemed guilty of unjust discrimimation, which is hereby prohibited and declared to be unlawful, and upon conviction thereof shall forfeit and pay into the State treasury not less than one hucdred dollars, nor more than one thousand dollars for each offense; and such agent or officer so offending shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than fifty dollars and not more than one hundred dollars for each offense. Pro-

vided, that this provision shall not be construed to prohibit the privilege of passes or franks or the exchange thereof with each other for the officers, agents, employees and their families of street railroads, telegraph, telephone and cable lines, and the officers, agents, employees and their families of other street railroads, telegraph, telephone and cable lines and with the the officers, employees and their families of railroad, express and sleeping car lines, union depots and other common carriers. Provided, however, that nothing in this Act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers for the exchange of services. Nothing herein shall prevent the transportation of persons or property or the production, transmission, delivery or furnishing of heat, light, water or power, or the conveying of telegraph or telephone messages within this State free or at reduced rates for the United States, the State, or any municipality thereof, or for charitable purposes, or to employees of any such public utility for their own exclusive use and benefit, nor prevent any such public utility fromgiving free transportation or service, or reduced rates therefor, to its officers, agents, surgeons, physicians, employees and attorneys at law, or members of their families, or to former employees to such public utilities or members of their families where such

> former employees have become disabled in the service of such public utility or are unable from physical disqualification to continue in the service, or to members of families of deceased employees of such public utility; to ministers of religion, inmates of hospitals and charitable and eleomosynary institutions and persons exclusively engaged in charitable and eleomosynary work. The Commission may in its discretion require to be filed with it by any public utility a list, verified under oath of the president, manager, superintendent or secretary of any public utility, of all free or reduced rate privileges granted by such public utility under the provisions of this section."

Pursuant to this section of the Act the City of Salem on or about the 20th day of May, 1913, filed with the Public Service Commission a complaint, wherein it prayed that the Public Service Commission have a valuation made of the Water Company's plant, and it was also alleged in Paragraphs V and VI of the complaint that the rates and tolls and charges of the Water Company, as shown by the schedules of rates on file with the Public Service Commission, were discriminatory and based upon arbitrary classifications, and was as well producing an income and revenue in excess of the reasonable return upon the money invested by the Water Company in its plant. A copy of this petition is attached to the answer and made an integral part thereof. It is to be noted that no issue was tendered by the com-

plaint, filed with the Commission that the rates and tolls being paid by the City, under the franchise contract with the Water Company were discriminatory, unreasonable or arbitrary. No complaint was made.

Subsequent to the filing of the petition, and on the 14th day of March, 1914, nearly a year subsequent to the filing of the complaint with the Public Service Commission, the Council adopted a resolution, No. 1294, as follows:

> "BE IT RESOLVED by the Common Council that the Railroad Commission in adjusting the rates of the Salem Water Co. for the City of Salem on the private users, that they take into consideration the price at which the hydrants should be charged to make an equitable rate for the private user, and if the rate now charged the City for hydrants by the Salem Water Co. is too high or too low, that it be adjusted accordingly. That the City Recorder be instructed to send a copy of this resolution to the Railroad Commission.
>
> Adopted by the Common Council this 16th day of March, 1914.
>
> Attest: CHAS. F. ELGIN."
>
> City Recorder."

It is the on Commission's order on this resolution that the Water Company claims that it is entitled to the difference between $1.82, the franchise rate, and $2.50 per hydrant per month. It is alleged in the answer, in connection with the adoption of this Resolution as follows:

Paragraph VII Amended Answer (Transcript, page 32).

Answering paragraph VII of plaintiff's complaint said defendants admit each and every allegation therein contained, and further allege that subsequent to the filing of said petition referred to in paragraph VI hereof, and which is "Exhibit A" of this amended answer with the Public Service Commission of the State of Oregon, and while the said petition was under consideration by said Commission, the members of said Com mission requested the City Attorney of defendant City to secure the adoption of a resolution by the Common Council of defendant City embodying the terms set forth in said Resolution No. 1294, but in and by Section VI of said Ordinance No. 207, and in and by Section III of said Ordinance No. 346, and in and by Section III of Ordinance No. 368, it was provided as follows:—

> "This ordinance shall not be altered, amended, or repealed without the consent of the said Salem Water Company, except, for the violation by them of any of the provisions of this Ordinance."

and thereafter, in accordance with the terms and provisions of said Ordinances, and a short time prior to the introduction of said Resolution No. 1294 into the Common Council of defendant City through its City Attorney, requested the plaintiff herein to join in said resolution and consent and agree with said defendant City, that said Public Service Commission should make a finding and determination as to the amount of

a just and reasonable charge for said defendant City to pay the plaintiff for supplying the hydrants of said defendant City with water, for the purposes hereinbefore alleged, and thereafter, the defendant City, through its Common Council would amend Section IV of said Ordinance 207 in accordance with the order, finding and decree of the said Public Service Commission as to the amount of a just and reasonable rate and charge to be paid by defendant City to plaintiff for furnishing and supplying the hydrants and cisterns of said defendant City with water, but said plaintiff refused to join with defendant City in said Resolution No. 1294 or agree or consent thereto prior or after the adoption thereof by the Common Council of said defendant City, and prior to a determination thereof by the Public Service Commission, and thereafter, defendant City for the purpose of securing and ascertaining the amount of a just and reasonable charge, rate and tariff to be paid by defendant City to the plaintiff for furnishing defendant City with water for its hydrants and cisterns, and only as advisory in such matters and not otherwise, defendant City adopted the aforesaid Resolution and caused to be filed with the said Public Service Commission said Reso ution No. 1294, so as to enable said defendant City thereafter, if it so desired to do with the consent of said plaintiff, so amend said Ordinance No. 207, and Ordinance No. 346 and No. 368, amendatory thereof, in accordance with the finding and determination of the Public Service Commission as to the amount of said rate and charge and tariff found to be just and reasonable, and defendant City

did never agree or contract with said plaintiff that said City would be bound or agree to the rate, charge, and tariff found to be reasonable by said Public Service Commission, in reference to any reduced or preferential rate fixed by defendant City, as a part of the consideration for granting plaintiff's Assignors the rights, privileges, and franchises hereinbefore alleged.

The Public Service Commission's order so far as material herein is as follows:

> 17. "By resolution of the Common Council of the City of Salem, adopted March 16, 1914, and filed with the Commission March 18, 1914, it was resolved that the Commission, in adjusting the rates of the defendant for private users, should take into consideration the price at which hydrants should be charged to make an equitable rate for the private user, and that if the rate presently charged the City for hydrants by the defendant should be too high or too low, it be adjusted accordingly.
>
> Pursuant to such request and from the record before it, the Com.nission finds the rate charged by defendant to the City of Salem for fire hydrants and cisterns is insufficient as compared with the charges made to private users, considering the relative demands of the service and the amount of investment on account of the City and private consumers, respectively: and that the present hydrant rate, $1.82, casts an undue burden upon other users than the City. The

effect of such unduly low rate is that patrons who use water have been compelled to pay and now pay more than a reasonable rate for their service to make up the deficiency in return for the service to the City from which they derive no benefit that is not equally shared by taxpayers and property owners who are not patrons of defendant. A just and reasonable hydrant rental is the sum of $2.50 per hydrant per month. In adjusting the schedule of rates for private water users above prescribed, the action of the Common Council of the City of Salem, and this finding as to a reasonable rate for hydrants, have been taken into consideration by the Commission.

The action of the Common Council of the City of Salem does not in terms contemplate any waiver of the franchise provision as to the furnishing of water for the other purposes required by the franchise, and the rates prescribed by the Commission for private users have been fixed in contemplation of the continuance of the free service afforded the City in return for the franchise granted."

The order of the Commission is made a part of the City's answer. It is alleged, in connection with the adoption of this resolution, that its purpose was only advisory. The demurer admits that it was never recognized by the City, and immediatly upon the Commission making an order increasing the rates the City ab-

solutely refused to recognize the binding force of the order by refusing to pay the increase toll. The resolution was adopted conditionally, that is that the consent of the Water Company was contemplated, before it should have any binding force. It is alleged in the answer that the City requested the Water Company to join in this petition, and that the Water Company refused to do so. It is further alleged that it is provided in the franchise contract between the Water Company and the City that the franchise contract cannot be amended by the adoption of a resolution. It requires an ordinance to effect an amendment. These facts will appear in the third seperate answer and defense. It is further alleged in the answer that the City had actually tendered the Water Company the sum of $1.82 for hydrant service for the consumption of water by the City required by the franchise.

The City has refused to pay the difference between the amount fixed by the order of the Public Service Commission, as required by Section 17 of the order, and the amount fixed in Section 4 of the franchise contract, found on page 6 of this brief, providing that the City shall not be required to pay more than $1.82 per month for each hydrant actually supplied. The order of the Commission became effective from the 1st day of October, 1914, (see page 74 of the transcript.) The City refused to pay the increase in tolls commencing from the first day of October, 1914; but stood ready to pay for its water service under the franchise rate of $1.82 per hydrant. On the 17th day of May, 1917, the defend-

ant in error filed an action at law against the plaintiff in error to recover for water tolls covering a period between October 31st, 1914, and April 1st, 1917, in the sum of $12,810,88, with interest. The City answered setting forth the constitutional, statutory, and charter provisions and facts herinbefore detailed. A demurer to the answer was sustained. The plaintiff in error refusing to plead further, the defendant in error then filed a motion for judgement on the pleadings which was allowed by the court, and judgement was thereupon entered against the plaintiff in error for the sum of $12,-810.88 with interest from the 21st day of May, 1917, in the sum of $602.11; judgment entered March 4, 1918.

SPECIFICATIONS OF ERRORS

The following are the specifications of error relied upon by the plaintiff in error, and which are intended to be urged by it on the writ of error as grounds of reversal of the judgement of the District Court, and are identical with the errors suggested under the head of "Assignment of Errors" in the printed transcript of record commencing at page 91 thereof, to-wit:

I

The Court erred in sustaining plaintiff's demurrer to defendants' amended answer.

II

The Court erred in sustaining plaintiff's motion for default judgement against the defendants.

III

The Court erred in sustaining plaintiff's motion for judgement on the pleadings and entering judgement thereon.

IV

The Court erred in entering judgement in this cause in favor of the plaintiff and against the defendants.

V

The Court erred in allowing any sums of money as interest on the amounts demanded in the complaint and entering judgement therefor.

Each of the foregoing assignments of error are based upon the grounds and for the reason that the same is contrary to law and decisions of the courts.

POINTS AND AUTHORITIES

I

The Public Service Commission derives its powers only from the statute, and has no authority except such as is expressly conferred on it, and possessing no statutory authority to abrogate a contract of the city or to change or modify the terms of the franchise contract between the city, as grantor, and the Water Company, as grantee, the order increasing the franchise rate for service furnished the city was void for want of authority.

People v. Public Service Com., 171 App. Div. (N. Y.) 910.

Public Service Com. v. I. C. R. R. Co., 274 Ill. 41.

City of Augusta v. Lewiston A. W. St. Ry. 114, Me. 24;

Commissioners v. O. R. & N. Co., 17 Or. 65;

State v. Corvallis & E. Ry. Co., 59 Or. 450;

Atcheson T. & S. F. Ry. Co., v. Corporation Commission—Olk—, 170 Pac. 1156.

II

A franchise granted under proper authority, which has been accepted and acted upon by the grantee and

its successors, is an executed contract which cannot be altered without the consent of both parties thereto.

Haines v. Eastern Oregon L. &. P. Co., 76 Or. 402;
Detroit U. R. v. Michigan, 242 U. S. 238.

III

A city has two classes of powers—the one legislative, public and govermental, in the exercise of which it is a sovereignty, and governs its people; the other proprietary, quasi private, conferred upon it, not for the purpose of governing its people, but for the private advantage of the inhabitants of the city and the city itself as a legal personality. In a contract for supplying itself and citizens with water, the city is exercising its business or propritarye powers, and while the rule against discrimination does not apply to municipal corporations, yet in the exercise of its proprietary powers it is usually governed by the same rules of general law that govern a private corporation.

3 Dillon Mun. Cor. 5th Ed. Section 108 et seq. also p. 2134;
Pond Public Utilities, Section 6;
Esberg Cigar Co. v. Portland, 34 Or. 287;
Omaha Water Co. v. Omaha, 147 Fed. 1;
Indianapolis v. Gas Co. 66 Ind 396;
Illinois Trust Co. v. Arkansas City, 76 Fed. 271.

Reed v. City of Anoka, 85 Minn. 294.

VI

The general power to contract delegated to the city in Section 3 of the Charter (Transcript page 23) as well as the power to provide the city with water; as well as the power to establish a fire department, and to provide for the prevention and extinguishment of fires (Transcript page 25-27) are sufficient in themselves to authorize the city to enter into a contract for furnishing its hydrants with water. In making such contract as one of the high contracting parties the city is exercising its proprietary or private rights as distinguished from its government or public functions.

Little Fall E. & W. Co. v. Little Falls, 102 Fed. 663;

Illinois Trust Co. v. Arkansas City, 76 Fed. 271;

Gosport v. Pritchard, 156 Ind. 400;

Webb City & C. W. Co. v. Webb City, 78 Mo. App. 422;

Saleno v. Neosho, 127 Mo. 627, 641;

Los Angeles City Water Co. v. Los Angeles, 88 Fed. 720.

V

The City of Salem was created by special act of the Legislature in 1862, and acts amendatory. Under the act of 1891, it was granted exclusive power to contract for supplying itself and inhabitants with water on such terms and conditions as its council may prescribe. The city entered into a franchise contract with a water company, granting the company the right to use the streets of the city for fifty years for laying its pipes and mains, and provided that certin places should be furnished with water free, and for other purposes, at a contract rate of $1.82 per month for each hydrant used by the city during the life of the franchise. Rates for consumers were not fixed. The delegation of exclusive power, contained in the Act of 1891, to contract for water on such terms and conditions as the council may prescribe, authorized the city, as a part of the consideration for granting the use of the streets, to stipulate for its own water service a preferential and reduced rate, as betwwen itself and other consumers. The delegation of power amounted to a complete surrender of the police power to regulate rates, and when once exercised would be irrevocable during the life of the franchise. The power of the state to regulate rates is suspended during the life of the franchise.

3 Dillion Mun. Cor. 5th Ed., p 2239;
3 Thompson Cor., Sec. 2962;
Salem v. Anson, 40 Or. 343;
Omaha Water Co. v. Omaha, 147 Fed. 1;
Muncie Natural Gas Co. v. Muncie, 168 Ind. 97;

Cleveland v. Cleveland City Ry. Co., 194 U.S . 517;

State Ex. Rel v. Public Service Commission — Wash —, 172 Pac. 890;

Bessemer v. Water Works, 152 Ala. 391;

Birmingham W. W. Co. v. Birmingham, 211 Fed. 497;

Wichita W. Co. v. Wichita, 234 Fed. 415;

Home T. & T. Co. v. Los Angeles, 211 U. S. 265;

Detroit v. St. Ry. 184 U. S. 368;

Vicksburg v. Water Works, 206 U. S. 496;

Portland Ry. L. & P. Co. v. Portland, 201 Fed. 125; and authorities cited.

VI

By the terms of Section 2 of Article XI of the Constitution of Oregon, under which the city holds its present charter, and entered into the franchise contract in question, the Legislature of the State was expressly restricted from impairing of destroying the corporate rights of municipalities, and, hence, the rule that the contracts of municipalities are not within the protection of the Federal Constitution does not spply. In its executed contracts and corporate rights, a municipal corporation, as far as the Federal guarantees are concerned is subject to the same rules as a private individual or corporation.

Hartford v. Hartford Bridge Co., 10 How. (U. S.)

511, 533, 534;
Mt. Pleasant v. Beckwith, 100 U. S. 514;
Worcester v. Worcester R. Co., 196 U. S. 539;
Oregon Const. Article 11, Section 2; L. O. L. Page 118;
Also Article 4, Section 1a; L. O. L. Page 91;
Grogan v. San Francisco, 18 Cal., 613;
Dillon, Mun. Corp. 5th Ed. Sections 109-111;
Quinby v. Public Service Commission, 223 N. Y. 244; 119 N. Y. Sup. 1109.

VII

Legislative control over Municipal Corporations is not so transcendent and absolute as to extend to an arbitrary divesture of its private property and the destruction of rights of a private nature.

Dillon Municipal Corporations 5th Ed. Sections 109-111; and authorities cited; Cooley Const. Lim. 6th Ed. P. 288.
Note 35 Am. St Rep. 529 et seq.

VIII

Discriminations, unjust and unreasonable preferences in favor of the public were not held to be against public policy and unlawful at common law. In the

absence of a statute expressly prohibiting furnishing service to a municipality at a reduced rate, or a free service, such discrimination or preference cannot be held illegal as a matter of law, without overturning the foundation upon which the rule is built. Hence, the city stipulating for a free service for its public buildings and parks, and in fixing a reduced and discriminatory rate for itself for other purposes, in its franchise contract with the Water Company, entered into a lawful contract not prohibited by the Public Utility Act. But on the contrary, the latter part of Section 63 of the Public Utility Act expressly recognizes the validity of such discrimination, preferences and concessions, and the Commission exceeded its jurisdiction in intermeddling with the terms of the franchise contract in this respect.

Pond Public Utilities, Section 223;
Wyman, Public Service Corporations, 1304;
Public Utility Act, General Laws 1911 C. 279, Sec. 63;
City of Belfast v. Belfast W. Co., — Me—, 98 Atl. Rep. 738;
New York Tel. Co. v. Siegel Cooper Co., 202 N. Y. 511; 36 L. R. A. (N. S.) 560;
Superior v. Tel. Co., 141 Wis. 363; 122 N. W. 1023.;
Fretz v. City of Edmond,—Olk—, 168 Pac. 800.

IX

All prior contracts for the furnishing of water between cities and water companies were expressly validated and continued in force by the Legislature.

Or. Laws 1911, Chapter 80, Sec. 2.

X

The provisions of the Public Utility Act, found in Section 61, refer to franchise contract provisions fixed by municipalities for the benefit of private consumers, and fixing tolls and charges to be paid by them, and not to the terms of a franchise as between itself, as grantor, and the Public Service Corporation, as grantee. Section 61 of the Public Utility Act must be read in pari materia with Section 63.

Electric Co. v. Utility Com., 88 N. J. L. 603; 96 Atl. 1013,

Belfast W. Co. v. City of Belfast, — Me —,; 98 Atl. 738;

Seton v. Hoyt, 34 Or. 279.

XI

A city being a governmental agency, is not within the provision of the Public Utility Act, inhibiting un-

just preferences and discriminations. The general rule is that the sovereign or its agencies are not bound by the words of a statute unless expressly named.

State ex rel v. Peninsular T. Co., 75 Southern Rep. 201, Adv. Sheets;
Seton v. Hoyt, 34 Or. 266.

XII

The doctrine of waiver, ratification and estoppal do not apply to cases where the action of the city is ultra vires.

3 McQuillin Mun. Corp. Section 1172; et seq
Also Section 1256.

XIII

Jurisdiction cannot be conferred by consent; nor can jurisdiction be conferred by waiver.

City of Augusta v. Lewiston A. & W.St.Ry. 114 Me. 24.

XIV

Waiver is the intentional relinquishment of a known

right, benefit or advantage, or such conduct as warrants an interference of the relinquishment or such right. There can be no waiver unless so intended by one party and so understood by the other, or one party has so acted as to mislead the other and is estopped.

16 Cyc 805; 40 Cyc 261;

ARGUMENT.

This is a controversy between a municipality and a public service corporation, arising out of the terms and conditions prescribed and fixed by the Common Council in a franchise contract granting and allowing a water company the use of the streets of the city to lay its pipes and mains, for the purpose of supplying the city and its inhabitants with water. The precedents, in cases where the controversies have been between a public service corporation and a public utility commission empowered to regulate and fix the rates. tolls and charges for a given service, after a hearing as to the reasonableness of the rates as between the private consumer or public, and the corporation furnishing the service, are of little value as announcing any legal principles applicable to the controversy which arises in this case, except in those few cases, where under legislative authority the rates and tolls to be charged by the public service corporation for supplying the city and its inhabitants with service, were fixed by an agreement as a part of the consideration for granting the use of the streets to a public service corporation, and which the courts have held to constitute a surrender of the police powers of the state to the municipality to fix rates, and any subsequent reduction of the rates fixed, by the municipality, impaired the obligation of the contract.

In those cases, the controversy was between the public service corporation and the city or state, changing the rates or tolls prescribed and fixed in the franchise

contract for the service furnished private consumers, or the public and not for service furnished the city as a part of the consideration of the franchise contract. There seems to be but few reported cases where there has has been an attempt, either on the part of the city, or a public utility commission, acting with delegated authority, to change the rate for service furnished a city for itself under its franchise contract with the public service corporation. We have carefully collated these cases, and they are to be found under Paragraphs 3 and 5 of our points and authorities. None of them sustain an order of a utility Commission modifying the terms of a franchise contract between the grantor and grantee where a rate is fixed for the service to be given the grantor by the grantee for a fixed period.

The cases are distinguishable on the principle that in the case where the contorversy was over the rates and tolls for furnishing the public consumers with water, the question presented was one involving the exercise of the police power of the state—a power legislative in nature —and in the case under consideration, the controversy is over the term of a franchise contract, and the performance thereof, involving the exercise of the private and proprietary powers of the municipality.

This distinction is clearly pointed out by Judge Harris in the case of Woodburn v. Public Service Commission, 82 Or. 114, relied upon by the water company in the court below as decisive of every issue of the case, and which will be discussed later on. Judge Harris of the

Oregon Supreme Court pointed out the distinction as follows:

> "Throughout the discussion there must be borne in mind that the State, acting through the Public Service Commission is a party to this suit, and consequently judicial precedects arising out of controversies between none but the immediate parties to a franchise, are not controlling here. Moreover, the present juncture does not call for a decision of the relative rights of the grantor and grantee of a franchise, as between themselves. Furthermore, the very purpose of this litigation is to determine whether the State has in fact empowered Woodburn to fix a schedule of rates, which the State could not afterward change, and hence we must also distinguish all those judicial utterances which followed a finding that the State had actually conferred upon a city the power unalterably to fix the rates to be charged by the grantee of a franchise."

It is our first contention in this case, that the city, bya grant from the Legislature under the legislative act of 1891, was given authority to negotiate and execute a contract with a Water Company to supply itself and citizens with water and that one of the considerations stipulated in the contract and reserved by the city as a special benefit for allowing the Water Company's predecessors the use of the streets to lay its pipes and mains, was that the city should not be required to

pay more than $1.82 per hydrant or cistern during the life of the franchise, and by an acceptence of the franchise, and acting upon it by both parties, the franchise granted has become an executed contract, and cannot be altered without the consent of the city. And that the city in negotiating the contract in question, for the service to be furnished itself, whether preferential or otherwise, was acting in its private and proprietary capacity, and should be treated in the same manner as a private individual or corporation, and is subject to the same rules of law, restrictions and responsibilities, but bearing in mind that discriminations, unjust and unreasonable preferences in favor of the state and its municipal agencies were not held to be against public policy and unlawful at common law, and the Oregon public utility act did not attempt to change this rule and any change or revision of the terms of the franchise contract fixing a preferential rate for the city's own service as between the city and the water company, except in accordance with its stipulations, by the Public Utility Commission, during the life of the franchise, amounts to an impairment of the city's contract, in violation of federal guarantees.

As preliminary to a discussion of the terms of the grant from the Legislature it may be well to observe that the granting of authority to Public Service Companies to use the streets is a legislative act, and it may be exercised directly by the Legislature, or be delegated by that body to a municipal corporation. Professor Pond, in his recent work on Public Utilities, Section 117, says:

> "As before stated, the state has exclusive control over its highways, including the streets of municipal corporations, and this control remains exclusively in the state, except in so far as it may be delegated to the municipality, which accordingly has only so much power to control the streets and grant special privileges for their use as has been clearly conferred upon it by the legislative authority."

In Salem v. Anson, 40. Or. 343, an Oregon case which construes the extent of the authority of the common Council over the streets of the city, delegated to it by the **identical charter provision under consideration** the Supreme Court observes:

> "The legislature has thus delegated to the city the power of regulating and contolling the use of the streets by light and water companies, and vested it with exclusive authority to grant to such companies the privilege of so using them, upon such terms and conditions as the council may prescribe. The paramount authority over streets and highways is vested in the legislature as the representative of the entire people. It may, however, delegate to municipal corporations such a measure of its power as it may deem expedient, and the local authorities, by virtue of such delegation, can enact ordinances and local laws, which have within their jurisdiction, the force of the general statutes of the state."

The right then of the city in this case, to agree with the Water Company's predecessor upon the terms of the rate or toll which the defendant city should pay for the service of its cisterns and hydrants, furnished by the Water Company depends upon the extent of the grant to the city by the Legislative Assembly to contract with the water company's predecessor for the hydrant service in question. Are the charter powers of the city of Salem as conferred by the Legislative Assembly, sufficient to authorize the city to contract wiih the Public Service Corporation, in consideration of granting the right to use the streets, fix the rate during the life of the franchise that the city should pay for services furnished it by the water company? Did the city have the right to secure for itself some present or future benefit for granting the Water Company's predecessor this valuable franchise which would not be subject to revision or change.

We believe that the Legislative grant of power, quoted, was sufficient to authorize the city to make the franchise contract it in fact made with defendant's in error predecessors that there was a complete surrender by the Legislature of the sovereign power of the State to the city to contract in respect to the use of the streets on such terms and conditions as the council, acting either in its proprietary or governmental capacity might fix or determine, and thereafter any subsequent change in the franchise contract, either increasing or decreasing the rate to be paid by the city for the service furnished by the water company is an impairment of the city's contract, and is a taking of its property without

due process of law, and a denial of the equal protection of the law, in violation of Federal guarantees. And n must not be lost sight of, throughout this discussion, in considering these constitutional guarantees, that a municipal sub-division of the State of Oregon, organized by a Legislative Charter, pursuant to Section 2 of Article XI of the Constitution of 1859, is in its existing contracts rights just as much within the protection of the guarantees of the Federal Constitution as any private corporation, for that section of the Oregon Constitution provides that:

> "All laws passed pursuant to this section may be altered, amended or repealed, but not so as to impair or destroy any vested corporate rights."

By the terms of this provision municipal and private corporations are governed by the same rules of law in respect to their executed contract right as private individuals and corporations except the rule against unjust discriminations does not apply.

This phaze of the question will be discussed later. But it may be observed this rule is particularly true in respect to its rights while acting in its proprietary capacity.

Municipal corporations are said to possess two classes of power, namely: those which are granted for public purposes exclusively, and which are deemed to belong to the municipality in its public, political and municipal character, and are designated as legislative and govern-

mental in nature, and those where the powers granted are for the purpose of private advantages and emolement, and, notwithstanding the public may derive a common benefit therefrom, the corporation acts in its private or proprietary capacity. It is important that this distinction be kept in mind throughout the discussion of this case. The fixing of a franchise rate by the city for the service extended the city by plaintiff, as a part of the consideration for the privilege of using the streets, is to be viewed as an exercise of the contract powers of defendant city, acting in its private capacity in furtherance of its own interests. For the city sought, as a consideration and private emolument for its own benefit, for granting the right to the Water Company's predecessor to lay pipes and mains in its streets to secure unto itself a preferential rate for service as a part of its contract, and in the exercise of this right, the city was acting in its proprietary and business capacity, and is to be treated by the same rules of law as a private individual or corporation with the exception noted. Dillon, 5th Edition, Sec. 1303, page 2134, clearly announces this principle. The text is as follows:

> "If the municipality obtains its supply of water or light by a contract with a public service corporation or an individual, it acts in its so-called private and proprietary capacity in negotiating and executing the contract, and in questions arising in the performance of the contract the municipality should be treated in the same manner as a private individual or corpor-

ation and is subject to the same general rules of law, restrictions and responsibilities."

It is held, however, by all the authorities in cases where the charter powers are as broad as in this instance, that a city in contracts for supplying itself and inhabitants with water is not acting in its general governmental capacity, but is acting in its business and commercial capacity. Professor Pond, in Section 6, states the law as follows:

> The municipal corporation in contracting for the construction or purchase of plants providing such public utilities as gas, water or electric lights, while acting within the scope of their authority as conferred upon them by statutory enactment, either expressly or by necessary implication, is not exercising its governmental functions but is acting in its private business capacity for its own special benefit and the advantage of its citizens and is liable in the same way and to the same extent as a private individual or corporation."

As authority for the text he quotes from the case of Omaha Water Company v. Omaha, 147 Fed. 1, which he observes furnished an excellent state, ment and pertinent application of the principal, as follows:

> "In holding the defendant city liable under its contract to purchase the property of the water-works company made pursuant to prop-

er legislative authority and by the exercise of the option to purchase provided for in the franchise granted by the city to the plaintiff, the court says: 'A city has two classes of powers, the one legislative or governmental, by virtue of which it controls its people as their sovereign, the other proprietary or business, by means of which it acts and contracts for the private advantage of the inhabitants of the city and of the city itself. In the exercise of powers which are strictly governmental or legislative the officers of a city are trustees for the public and they may make no grant or contract which will bind the municipality beyond the terms of their office because they may not lawfully circumscribe the Legislative powers of their successors. But in the exercise of the business powers of a city, the municipality and its officers are controlled by no such rule and they may lawfully exercise these powers in the same way and in their exercise the city will be governed by the same rules which control a private individual or a business corporation under like circumstances. In contracting for the construction or purchase of water-works to supply itself and its inhabitants with water a city is not exercising its governmental or legislative, but is using its business or proprietary powers. The purpose of such a contract is not to govern its inhabi-

tants, but to obtain a private benefit for the city and for its denizens.'"

These two classes of powers, and the legal rights which arise out of them, received a thorough consideration in the case of Indianapolis v. Gas-Light Coke Company, 66 Indiana, 396. The court in this case says:

> "This power to legislate within the authority delegated to them by law is distinct from the power to contract, although exercised by the same corporation. They cannot by contract delegate or restrict their legislative power, nor can they, merely by their legislative power' make a contract. These two powers need not be confounded. The exercise of the legislative power required the consent of no person except those who legislate; while it is impossible to make a contract without the consent of another,or others. We think, therefore, when the city of Indianapolis made the contract in question with the Gas-Light Company it made it in the exercise of its power to contract, and not in the exercise of its power to legislate, although the power to make the contract was authorized by an ordinance; and, having the power to make a contract touching the subject-matter, it had the right to make it according to its own discretion as to its prudence or good policy, within the limits of its franchise."

Says the United States Circuit Court of Appeals,

eighth circuit, in Illinois Trust & Savings Bank v. Arkansas City, 76 Fed. 271, (34 L. R. A. 518):

> "A city has two classes of powers,— the one legislative, public, governmental, in the exercise of which it is a sovereignty, and governs its people; the other, proprietary, quassi private, conferred upon it, not for the purpose of governing its people, but for the private advantage of the inhabitants of the city and of the city itself as a legal personality. In the exercise of the powers of the former class it is governed by the rule here invoked. In their exercise it is ruling its people and is bound to transmit its powers of government to its successive sets of officers unimpaired. But in the exercise of the powers of the latter class it is controlled by no such rule, because it is acting and contracting for the private benefit of itself and its inhabitants, and it may exercise the business powers conferred upon it in the same way, and in their exercise it is to be governed by the same rules that govern a private individual or corporation * * In contracting for waterworks to supply itself and its inhabitants with water,the city is not exercising its governmental or legislative powers, but its business or proprietary powers. The purpose of such a contract is not to govern its inhabitants, but to obtain a private benefit for the city and its denizens."

The city, in granting the franchise in question to the water company's predecessor did so by ordinance, as is required by charter provision. It sought as a personal and private benefit to itself certain benefits and advantages. It provided that the engine houses, council chambers, city prison and office buildings should be furnished with water free of charge, as well as the furnishing free of charge water for public drinking fountains for man and beast, at such places as the council should designate. In addition to this service, required to be furnished gratis, the city sought to secure a water service at a low rate for other municipal purposes, and therefore, it secured as an additional consideration in the franchise, that the water should be furnished at the specified rate or toll of $1.82 for each hydrant and cistern belonging to the city. It left the question of water rates for service furnished for private consumers or the public to be taken care of in the future. While the Common Council had ample power to fix rates for private consumers or the public during the life of the franchise under the charter provisions quoted it refrained from doing so and left the regulation of water tolls open for future action by providing in section IV of Ordinance No. 207 that the water company shall not charge at any time higher rates for water than is customarily allowed for water in towns or cities of like population on the Pacific Coast. But as far as the city's water rates were concerned they were unalterably fixed and determined for the life of the franchise.

It is quite clear that the city, in incorporating these stipulations into its contract with the water company's

predecessors, was contracting in its proprietary and business capacity, as it had authority to do under the charter provision heretofore mentioned. Theses stipulations and covenants are not unusual in franchise contracts Reported cases sustain such provisions in franchise contracts, as furnishing water free to churches and schools. Discussing the terms and stipulations of a franchise between a municipality and a water company, Judge Dillon, in his last edition on Municipal Corporations, Section 1326, says:

> "When a municipality grants to a water or light company the right to use the city streets to lay its pipes and mains and at the same time contracts for a supply of water or light for its use and for the use of its inhabitants by virtue of valid legislative authority conferred upon it its power to grant the franchise and to make the contract permits it to prescribe conditions and regulations as to the manner in which the the powers conferred shall be exercised, so far as such limitations and conditions are not inconsistent with the Constitution and with the statutory authority under which it acts. In the protection of the public interest it may attach such limitations and conditions as have a proper relation to the subject matter of the grant. Restrictions, limitations or conditions relating to and regulating rates have a proper relationship to the subject matter of the grant, and may, under proper legislative authority, be

made a matter of stipulation in connection therewith."

Wyman in his work on Public Service Corporations, says:

(Section 1304)

"It is moreover, well established that in granting any legal privileges to a public service company, if the franchise conferred bo no more than incorporation itself, the granting government of whatever grade it may be, may stipulate for free service for its own public purposes."

In the case of City of Belfast v. Belfast Water Company,—Maine—, 98 Atl. 739, not yet officially reported, a contention was made that the provisions of a franchise contract between a water company and the city, providing for free service to the city after a certain time, was invalid. The court held that there was not an illegal discrimination in favor of the public, and the contract was in this respect valid and legal. The court said:

"Another answer is that free service to the public is not at common law unreasonable and therefore unlawfully discriminatory. The law against unreasionable discrimination rests on public policy. It is forbidden because it is opposed to the interests of the public, which requires that all should be treated alike under like circumstances. Discriminations, how-

> ever, in favor of the public are not opposed to public policy, because they relieve the people generally of part of their burdens. In the absence of legislation upon the subject such discriminations cannot be held illegal as a matter of law, without overturning the foundation upon which the rule itself is built."

To the same effect is City of Superior v. Telephone Company, 141 Wis. 365, 122 N. W. 1023 These cases also sustain the proposition that any change in such rates impairs the obligation of the city's contract.

Defendant in error in the court below argued this case on the theory that the fixing of the sum of $1.82 per hydrant for the price of water furnished defendant by plaintiff during the life of the franchise involves a consideration of rate regulation, and cites the Home Telephone Company case, 211 U. S. 271, as an authority for the proposition that the city exceeded its authority to fix unalterably, during the life of the franchise, the rate or toll the city should pay for its own water service. That the fixing of rates in a franchise contract amounts to a surrender of a power of government, and unless the authority is clearly delegated to the city, the power does not exist. Specific authority for the purpose is required, and such authority is not found in the Salem charter.

Now viewing the franchise contract from this point, we are unable to see where the principles announced in the Home Telephone Company case deprive the city

of the power to fix rates for its own service—a preferential and discriminatory rate—as a part of the consideration for using the streets of the city for laying pipes and mains. This calls for a construction of the charter provision authorizing the city to contract for a supply of water for itself and citizens.

Bearing in mind that municipal corporations in the State of Oregon have never been formed or organized under general laws, until after the adoption of the Home Rule Amendment, but their charters were the subject of a special grant, or adopted by an act of the Legislative Assembly, and the power to alter or amend the charters of any municipal corporation was subject to the limitation that no vested corporate rights of the city should be impaired or destroyed, let us turn to the charter of the City of Salem and examine the extent of the grant made by the Legislative Assembly to the city to contract in reference to supplying itself and inhabitants with a supply of water, and what terms and conditions it might lawfully prescribe for granting defendants in error's predecessors the right to use the streets of the city to lay its mains and pipes. Laws 1891, page 1088, Section 6, sub-division 6, provides:

> "The Mayor and aldermen shall comprise the common council of said city, and at any meeting shall have exclusive power—
>
> To provide for lighting the streets and furnishing the city and the inhabitants thereof with gas or other light, and with pure and

wholesome water, and for such purposes may construct such water, gas or other works, within or without the city limits, as may be necessary or convenient therefor; provided, that the council may grant and allow the use of the streets and alleys of the city to any person, company or corporation who may desire to establish works for supplying the city and the inhabitants thereof with such water or light upon such terms and conditions as the council may prescribe."

It is by virtue of this provision that the city entered into the franchise contract in question (Ordinance No. 207 and supplementary thereto). Whether the city had the power to enter into the franchise contract in question, requires a construction of this section of the charter by the court.

As to what is the extent of the power conferred by subdivision 6 of Section 6, quoted, it may be well to refer to the text of approved authors, and to judicial decisions construing like charter powers. It will be seen that in precedents herein referred to the controversies were where there was an attempt on the part of the city to decrease the rate or charge fixed by a franchise prescribing and fixing a schedule of rates to be charged by the Public Service Corporation, and in these cases the rule of law was invoked that nothing may be taken by implication against the city, and that a contract regarding a public franchise should be construed most favorably to the municipality, and these

cases also were decided under Constitutional provisions providing for the organization of municipalities under general laws, and that these general laws may be altered or repealed without any saving clause as to vested corporate rights of the municipality. The court held in these cases that as far as the Public Service Corporation was concerned that these contracts were protected by the provisions of the State Constitution and Federal Constitution, inhibiting the impairment of the obligation of contract, and that this section of the State Constitution, as between the corporation and the city, must be read in pari materia with the Constitutional provision providing that municipal corporations may be organized under general laws. It seems to us this rule should have a more liberal application in the city's favor in a case arising in a controversy as between the city and a grantee of one of its franchises, where there is an attempt to repudiate a part of the considerarion of the franchise contract on the part of the grantee. These cases were all decided upon the principle that the State had surrendered its sovereign power to legislate to the city, and the State had suspended its power to exercise the Legislative function for a given period of time.

Judge Dillon, in discussing public utilities, in relation to municipal affairs, on page 2239, Vol. 3. says:

> "Whether these limitations or restrictions are binding upon the municipality also, and form a contract on its part that during the term of the contract the corporation shall have

the right to exact charges within the maximum prescribed, is an entirly different question. The municipality having derived its powers from the legislature and contracting for a supply of water or light by virtue of statutory authority, any stipulations which it may enter into limiting or affecting its future powers as to rates must be founded upon express or unmistakable legislative authority. When the legislature has conferred such express or unmistakable authority upon the city, the city may, within the scope of such authority and in the absence of any special constitutional restriction, stipulate what rates may be charged by a water or lighting company for the service rendered to the city and its inhabitants, and may also stipulate that such rates shall not be reduced during the contract period, and in such case such stipulation, when thus authorized, constitute a valid and binding contract protected by the Federal Constitution. When the price of the service is established either by statute or by a valid and authorized contract with the municipality, whatever price is permitted to be charged must be deemed reasonable and binding upon the consumer.

But it has been held that the power to regulate rates is a governmental power, continuing in its nature, which, if it can be bargained away at all, can only be bargained away by an

authorized express stipulation, and if any reasonable doubt exists whether it has been bargained away, or whether the city has power to so bargain it away, the doubt must be resolved in favor of the continued existence of the power to regulate; and because of this principle of the law cases are to be found which deny the power of the municipality to contract that rates for water and other public services shall remain unchanged during a term of years. But it is believed that a close examination of these cases establishes that they were either founded upon the peculiar facts and circumcumstances of the particular case, or upon some reserved right by Constitution or statute, which subjected a rate prescribed by contract to future regulation by the legislature, or by the municipality acting under delegated power. The question whether a municipality has implied authority as an incident to an express power to contract for a supply of water for public and private use to stipulate that rates shall remain unchanged during the term of the contract has been fully considered in a series of cases, which arose in the State of Illinois, and the existence of any such implied power has been rejected by the Supreme Court of that State. That court holds that when a municipality is merely authorized to contract for a supply of water or gas to be furnished by a corporation, the municipality has no power to

bind itself by vising the rate for such supply for an entire or long future period of the contract. If, pursuant to such statutory authority, an ordinance be made granting the right to use the city streets for a term of years and fixing the rates to be charged, the rates so fixed will be regarded as merely declaratory that such rates were reasonable at the time of the grant and until changed in competent form, and the stipulation will not be deemed a contract which binds the city to recognize the rates as reasonable and controlling for the entire period. When these Illinoise cases came before the Supreme Court of the United States for final review, it was held, by a divided court, that under the statutes conferring authority upon the cities and providing for the organization of water companies, the question whether the power of the city to contract for a supply of water was intended by the legislature to be subject to a continued power of regulation of the rates by the municipalities, was so far involved in doubt that the construction ought to be adopted which was most favorable to the public, and therefore that it must be held that the right to regulate the rates was not affected. Other cases in which it was held that stipulations in contracts with a municipality for a public service which prescribed for a long fixed period the rates of public service to the municipality and its inhabitants did not exempt the

companies from future regulation of these rates, appear to be founded upon a right reserved to the legislature or to the municipality to so regulate and control the rates by constitutional provision, or by a statute antedating the making of the contract which expressly reserved that right or reserved the power to alter or amend, or by some enactment which formed a condition, express or implied, inhering in the charter authority of the company."

Thompson in his work on corporations, Vol. 3, Section 2962, says:

"A state legislature may, by clear and express provisions in the charters it grants, surrender the power to regulate the rates of corporations affected with a public interest. If, therefore, the legislature of a state does, in plain and unequivocal language, surrender to a corporation of its creation the power to regulate its rates and charges for its services to be rendered to the public, and the grant so made is accepted, the legislature may not thereafter recall the power thus surrendered. The same power to barter away the right to regulate may be esercised by a municipality authorized thereto by the legislature."

The text quoted referred to a number of decisions, with which we believe this court is familiar, for they were all considered and applied in a case before the

District Court, construing a certain franchise granted to the Street Railway System of Portland, where it was held that under the peculiar provisions of the Portland Charter, the Council was not authorized to contract away the right of regulating the fares to be charged by the Street Railway Company during the life of the franchise, and the defendant in error pointed to this case below as controlling the construction to be placed on the charter provisions of the city of Salem, but it is to be noted that there is no similarity in the charter grants of power between the two cities. In the Portland charter there was no such broad grant of power as is found in the Salem charter. By Section 112 it was provided that every grant or a franchise, which provides for the charging of rates, fares and charges shall contain a provision fixing the maximum rate of fares, rates and charges which the grantee, his, its, or their successors or assigns, can charge or collect for services rendered, etc., but the same section contained an additional provision that the council reserved the right to thereafter from time to time change, alter, regulate and fix fares, rates or charges which the grantee, his, its, or their successors or assigns, can charge or collect thereunder, during the life of such grant or franchise. A further provision was contained in the charter:

> "At all times the power and right reasonably to regulate in the public interest the exercise of the franchise or right so granted shall remain and be vested in the council and said power and right cannot be divested or granted."

The court says on this point:

> "And this provision is carried into the complainant's franchise by express words. Here is a positive provision of the charter and franchise that the right to reasonably regulate in the public interest the exercise of the rights granted cannot be and was not granted away. The word "regulate" is a broad term. It is the word used in the Constitution of the United States to define the powers of Congress over interstate commerce, and it is hardly necessary to cite authorities to show that under such power Congress has the right to regulate the charges or rates for the transportation of freight or passengers by interstate carriers. Section 112 of the charter does not in terms or by necessary implication authorize or empower the city to enter into an irrevocable contract with the grantee of a franchise fixing the rates of fares which may be charged by such grantee. Such a contract is not indispensable or necessary to the exercise of the other powers granted. Moreover, the section must, we think, be read in connection with the other provision in the charter reserving to the city the right and power at all times to reasonably regulate in the public interest the exercise of a franchise granted by it. It is in the nature of a command from the supreme legislative power of the state to the city that it shall, in granting franchises which pro-

vide for a charge of fares, insert a provision fixing the maximum charges which the grantee or its assigns may charge or collect for services rendered during the lifetime of the franchise. It is a limitation rather than the grant of a power to contract or barter away the governmental right of regulating fares (Home Telephone & Telegraph Co. v. Los Angeles (C. C.) 155 Fed. 554-573), and the fact that no provision was entered in the franchise reserving to the city the right to change the rate cannot affect its power to do so."

On the other hand, the Supreme Court of Oregon, in a unanimous opinion, in the case of Salem V. Ansen, 40 Or. 343, in construing identical provisions under consideration, held that the legislature had delegated to the defendant city the exclusive power of regulating and controlling the use of the streets upon such terms and conditions as it may prescribe, which, in other words, means that there had been a complete delegation of power to the defendant city to contract in reference to its lights and water service. The charter provisions construed were the identical charter provisions involved in this case. The question involved was whether or not the city, under these charter provisions, had a right to exact a bond from a power company, conditioned that the terms of a franchise would be complied with. In construing the charter provision in question the court said:

"The legislature has thus delegated to the

city the power of regulating and controlling the use of the streets by light and water companies, and vested it with exclusive authority to grant to such companies the privilege of so using them, upon such terms and conditions as the council may prescribe. The paramount authority over streets and highways is vested in the legislature as the representative of the entire people. It may, however, delegate to municipal corporations such a measure of its power as it may deem expedient, and the local authorities, by virtue of such delegation, can enact ordinances and local laws, which have, within their jurisdiction, the force of the general statutes of the state: Tiedman, Mun. Corp. Sec. 289.

The granting of authority to public service companies to use the streets and highways is a legislative act, entirely beyond the control of the judicial power, so long as it is within proper constitutional limitations. It may be exercised directly by the legislature, or be delegated by that body to a municipal corporation; and, when so delegated, the municipality has, within the authority granted, the same rights and powers that the legislature itself possesses. To that extent it is endowed with legislative sovereignty, the exercise of which has no limit, so long as it is within the objects and trusts for which the power was conferred.

> It is admitted that the legislature may, by virtue of its paramount authority, require bonds or undertakings of the grantees of such privileges, conditioned that they will construct their works within a specified time, or that they will otherwise comply with the terms of their grant, and a municipal corporation to which the exclusive power over the subject has been delegated may exercise the same right. There is no express provision in the charter of Salem authorizing the council, upon granting the privileges to use the streets, to require that the work shall be done within a specified time; nor is it necessary. It is given the exclusive power to make the grant 'upon such terms and conditions 'as it may prescribe, which necessarily authorizes it to impose such reasonable conditions percedent or subsequent to the granting or exercise of the franchise as may be deemed necessary or proper, including a requirement that the grantee shall give a bond, conditioned as the one in suit."

This is an authoritive construction of the charter provision, and it would seem from the language used by the court that the state, through its Legislative Assembly, had surrendered its sovereign power over the streets of the city, in respect to contracting for light and water with any company, for the purpose of supplying the city and inhabitants with water.

In the first part of section 6 the Mayor and Common

Council are given the **exclusive** power to do numerous things, both in the performance of its Governmental functions and in its proprietary functions. The use of the word "exclusive" is significant, inasmuch as the use of that word would indicate that all power of the Legislative Assembly, as representative of the sovereign State, to legislate within the authority conferred and delegated, is vested in the Mayor and Aldermen of the defendant city. The Common Council is given exclusive authority by the terms of this grant to grant and allow the use of the streets and alleys to any corporation who may desire to established works for supplying the city and its inhabitants with water, upon such terms and conditions as the Council may prescribe. There is no residium of authority remaining in the legislature.

A statute of Indiana provided (Burns Rev. Stat. 1901, Sec. 3623) that, "The Common Council shall have exclusive power over the streets, highways, alleys and bridges within such city."

The City of Muncie, pursuant to this statutory authority, entered into a contract with a Gas Company for the supplying of the inhabitants with gas. The consumers' rates were fixed by the franchise contract, which gave the Gas Company the privilege of laying irs pipes and mains beneath the surface of the streets of the city. The Gas Company, finding the rates fixed in the franchise contract unsatisfactory, sought to increase the rates over those fixed in the franchise contract, and under threats of discontinuance of service to private consumers it was collecting from consumers a higher

schedule of rates than those fixed in the franchise contract. The city brought a suit to enjoin the breach of the covenants. It was claimed by the Gas Company that the franchise contract fixing a schedule of rates to be charged was ultra vires, and that the city had no authority to enter into a contract fixing the maximum rates to be charged the inhabitants of the city. The court said in Muncie Natural Gas Company v. Muncie, 168 Ind. 97, 60 L. R. A. 822:

> "We have to deal here with a question of ultra vires in its true sense; that is, where the act is claimed to be ultra vires the corporation itself. Municipal corporations possess and can exercise such powers only as are granted by the legislature in express words, and those necessarily or fairly implied or incident to the powers expressly granted, and those essential to the declared objects and purposes of the corporation. (Citing authorities)
>
> "The history of the workings of municipal bodies has demonstrated the salutary nature of this principle, and that it is the part of true wisdom to keep the corporate wings clipped down to the lawful standards." 1 Dill. Mun. Corp. Sec. 457. But, notwithstanding this background of inhibition, we think that it may be affirmed that appellee had power to enter into the contract in question. Section 61 of the act of March 14, 1867 (Burns' Rev. Stat. 1901, Sec. 3623), provides that "the common

council shall have exclusive power of the streets, highways, alleys and bridges within such city." Natural gas is a public utility that cannot be obtained by the citizens of a municipality generally, except as it is conducted in pipes along the public ways of the city. The grant of exclusive power to the Common Council over such ways comprehends the right to permit gas companies to use the streets. If the Common Council may permit a natural gas company to use the street without any conditions annexed except such as the law attaches, it is not perceived why, as in this case, in making provision for supplying, natural gas to all of the inhabitants of the city it may not protect such inhabitants against extortion by providing that the company shall not charge in excess of certain prices for its service. The right to annex terms by way of limitation upon the authority of the grantee in such cases has been often affirmed by this court. (Citing authorities). In Indianapolis v. Consumers' Gas Trust Co. 140 Ind. 116, 27 L. R. A. 517, 39 N. E. 436, it was said: "There was no compulsion on the part of the appellent to grant the privilege to use its streets to any particular company. It was within its discretion to give or not to give its consent, and it had the right to withhold it from all gas companies. Citizens' Gas & Min. Co. v. Elwood, 114 Ind. 332, 16 N. E. 624. It was

not limited alone to the granting of this franchise, but it had the right to prescribe and impose terms and conditions. Dill. Mun. Corp. Sec. 706; 2 Wood, Railroads, p. 986; Elliott, Roads and Streets, p. 565. When these terms and conditions, proposed by the appellant, were accepted by the appellee, and complied with, it became a binding contract." (Citing authorities). In Los Angeles City Water Co. v. Los Angeles, 88 Fed. 720, 731, the court said: "In procuring water, or any other commodity, by purchase, one of the first things to be considered and agreed upon is the matter of price. Therefore, to hold that a general power, without limitation, in a municipal corporation, to supply the city with water, does not include power to agree upon a price, it seems to me would be a solecism." The grant in this case may be said to rest upon the business or proprietary power of the city, as distinguished from its governmental or legislative power."

Again, the use of the words "upon such terms and conditions as the council may prescribe", taken by itself, is a grant to contract without limitation or exception. The council is vested, as far as the terms of any contract it may enter into with any public service corporation for furnishing water or light, with the right to enter into such a contract as their discretion and judgement dictated, unhampered by any terms and

conditions, except such as they choose to make. There is no boundry or limit to the contract which the city may enter into, if the usual and ordinary construction is given to the terms used in the legislative grant, and, therefore, the right to fix the rates the city itself should pay to the water company's predecessors for the service furnished the city as a part of the consideration for granting the franchise to lay pipes and mains in the streets of the city, was within the power of the council after an acceptance of the terms of the franchise, it is beyond the powers of the legislature to affect a change of its terms without impairing the obligation of the contract inhibited by Federal guarantees.

Such has been the construction placed by the courts on general statutes where these terms, or synonymous terms, have been employed as granting to municipalities the right to contract for supplying its citizens with a given public utility.

In the case of Cleveland v. Cleveland City Railway Company, 194 U. S. 517, it was held that where the legislature authorizes the city to fix the **terms and conditions** upon which street railways may be constructed, operated, extended and consolidated, that the city under this power could make a valid ordinance contract authorizing a consolidation of different railway systems within the city, and could legally fix the rate or fare for carrying passengers in the franchise agreement, which would be binding during the life of the franchise, and it was held by the Supreme Court of the United States, through the present Chief Justice

that this was an unalterable agreement, that the city could not reduce the rate or fare below that specified in the franchise contract, and that this contract was authorized by the delegation of the city of the power to fix the terms and conditions of the consolidation, and that reduction of the rate was an impairment of the obligation of the agreement. The terms of the statute were as follows: (Sec. 3443)

> "(Council, etc., may fix terms and conditions.)—Council, or the commissioners, as the case may be, shall have the power to fix the terms and conditions upon which such (street) railways may be constructed, operated, extended, and consolidated."

Judge White, in speaking of the grant of power, by employing the words quoted, says:

> "The statutes show that there was lodged by the legislature of Ohio in the municipal council of Cleveland comprehensive power to contract with street railway companies in respect to the terms and conditions upon which such roads might be constructed, operated, extended, and consolidated, the only limitation upon the power being that in case of an extension or consolidation no increase in the rate of fare should be allowed.
>
> That is passing ordinances based upon the grant of power referred to, the municipal council of Cleveland was exercising a portion of the

authority of the state, as an agency of the state, cannot in reason be disputed. If, therefore, the ordinances passed after August, 1879, and referred to previously, which ordinances were accepted by the predecessors of the complainant, with whom it is in privity, constituted contracts in respect to the rates of fare to be thereafter charged upon the consolidated and extended lines (affected by the ordinances) as an entirety, it necessarily follows that the ordinances of October, 1898, impaired these contracts.

The question for decision, then, is, Did the consolidated ordinance of February, 1885, and the ordinances thereafter passed and accepted, already referred to, constitute binding contracts in respect to the rates of fare to be thereafter exacted upon the consolidated and extended lines of the complainant?"

The case of Omaha Water Company v. Omaha, 147 Fed. 1, is a leading case on this question. It is cited by Judge Dillon in the text already quoted, as authority for his text. It has been quoted time and again in subsequent cases, both in the United States and Circuit Court cases, and is reported in the leading annotated series of cases. The opinion was written by Judge Sanburn, and concurred in by Justice Hook and Adams. It appears from the opinion that the Legislature of the State of Nebraska empowered the City of Omaha to contract with individuals or corporations for the con-

struction and maintenance of water works "on such terms and **under such regulations as may be agreed upon.** The city, by ordinance, offered a contract for the construction of the work, and their operation for a term of years to the lowest bidder, on consideration that he will first accept the terms of the ordinance, which ordinance provided that the contractors shall furnish water to private consumers during the term at such prices as the contractor and the consumers shall agree upon, not exceeding certain specified and fixed rates. The contractor accepted the ordinance and his assigns constructed the water works and operated them for a number of years. It was held by the court that the accepted ordinance was a contract, and when the city water board sought to reduce the water rates below those specified in the ordinance that the Water Company was entitled to an injunction restraining the enforcement of the city's order lowering the rates, for the subsequent order lowering the rates impaired the obligation of the previous contract. After reviewing all the decisions, and the Illinois decisions referred to by Judge Dillon, Judge Sanborn says:

> "Did the legislature of Nebraska empower the city of Omaha to agree upon unalterable water rates during the term of the contract in hand? Did the city agree that it would not reduce these rates below those specified in the ordinance? We turn back to the act of 1879 and to the ordinance contract of 1880 in the light of the rules and decisions to which we

have adverted, for the answers to these questions. Authority had already been granted to the city to build its waterworks and to regulate the use of water derived therefrom when the Act of 1879 was passed, but no waterworks had been constructed. The state then granted to the city the additional power to contract with third parties "13 for their construction and operation "on such terms and under such regulations as may be agreed on." Are the rates under which water is to be furnished to private consumers "terms and regulations" upon which parties may agree that waterworks may be constructed and operated? The Supreme Court was of the opinion that they were, for it held in the Cleveland case that a city was empowered to agree with a railway company upon rates of fares for passengers under legislative authority to fix the "terms and conditions" for the consolidation of corporation. The city of Omaha evidently thought so, for by the ordinance of 1880 it made specified water rates one of the terms and regulations of the contract which it offered to the lowest bidder and which it required him to accept. The main purpose of city waterworks is the revenue derived from private consumers of water. The rates which they pay absolutely determine the financial success or failure of a city water company's enterprise. The term or regulation in a contract for the

construction and operation of waterworks which more than any other conditions the nature and the prospect of the undertaking is that which fixes the rates which the owner may collect of private consumers. These are matters of common knowledge. The members of the legislature could not have been ignorant of them when they granted to this city the power to agree upon terms and regulations upon which the works should be built and operated, and it is incredible that they intended to except from this general grant the authority to agree upon the cardinal terms which alone conditions the success of the entire undertaking.

Did the city make such a contract? The stipulation concerning these rates is not embodied in the agreement for hydrant rentals which followed the ordinance of 1880. But the city required the contractor, as a qualification to receive the contract, to accept the terms and conditions of the ordinance, and an accepted ordinance is a contract. The ordinance was an offer by the city of the terms and regulations under which it would enter into a contract for the construction and operation of the waterworks. The city prepared and passed the ordinance. All its terms and words were the language of the city. It was enacted under a statute which empowered the city to agree upon the water rates. It prescribed

specific rates for the use of water by private consumers and provided that the water company should furnish water to them at such rates as should be agreed upon between the water company and the consumer not exceeding those specified in the ordinance. The concession is readily made that the acceptance of this ordinance constituted a contract by the water company to furnish the water to private consumers at prices not exceeding those named in the ordinance. The contention is that it left the city free to reduce them. If so, the contract permitted the city to retain the power to withdraw from the water company all the substantial benefits of its undertaking, for a reduction of the rates to private consumers would diminish the most substantial part of its revenue and might ruin the company. It cannot be that either the city or Locke intended to make an agreement of this nature, for such a transaction would be contrary to the ordinary course of action of rational men under similar circumstances. The chief object of the city in the procurement of this contract was a supply of water. The great desideratum of the contractor was remunerative rates from private consumers. The presumption is that the contract secured both, for both parties consented to it. Nor is it doubtful that this was its effect when its terms are fairly read. Concerning the meter rates, which are the subject of this suit, it stipulates:

"Rents for all purposes not herein named will be fixed by meter measurements as may be agreed upon between the consumer and water company not exceeding meter rates."

Here is a plain contract by the water company that it will agree with consumers upon rates not exceeding those specified in the ordinance, and as clear an agreement by the city that the water company and the consumer shall be free to agree upon any such rates which do not exceed those there named. The covenant of the city was that the water company should be free during the term of the agreement to contract with its consumers for any rate not exceeding those specified. Any reduction of those rates, any inhibition of agreements between the company and its consumers upon any rates not exceeding those there specified, necessarily deprives the company of that freedom to contract with its consumers and to collect from them, which the city covenanted by this clause of the contract that it should enjoy. Any reduction of these rates necessarily impairs the obligation of this contract because it deprives the water company of the full benefit of the term of the contract which was most important and beneficial to it. The order of the water board which purported to reduce the rates was made pursuant to a law of the state, and it was therefore violative of

section 10, article 1, of the constitution, and the bill states a good cause of action for an injunction to prevent its execution."

Under a charter provision, as follows:

"The mayor and aldermen of the city of Bessemer shall have full and ample power, jurisdiction and authority * * to make, erect and repair public wells, cisterns, and establish fire plugs and hydrants, and to make all needful provisions by contract, ownership of waterworks, or otherwise, for the supply of the city and citizens thereof with water."

It was held by the Supreme Court of the State of Alabama, in the case of Bessemer v. Water Works, 152 Ala. 391, et seq., that the city had the authority to contract for rates at which water should be supplied its citizens for a definite period, and of consequence to suspend its charter power in respect to the regulation of rates during such fixed periods. The principles announced were not different than those heretofore announced. The case is cited by Dillon in his note to the text already quoted as authority.

In a more recent case, decided by the United States District Court for the District of Alabama, where the rates had been fixed by franchise contract under a similar charter provision, though its terms were not quite as broad, that the city had the power to enter into a contract fixing during the life of a franchise the rates

to be charged by water companies for furnishing the inhabitants of the town with water. The city in this case attempted to lower the rates fixed in the franchise contract, and it was held in an ably considered opinion, after reviewing all the authorities, that the rates having been absolutely fixed under ample charter provisions that the city could not change the rates during the life of the contract. The case referred to is Birmingham Water Works Company v. Birmingham, 211 Fed. 497.

A more recent case of Wichita Water Company v. City of Wichita, 234 Fed. 415, construes a general law of the State of Kansas (General Laws 1889, Section 7185) which authorizes cities of the first, second and third classes to contract for and procure water works to be constructed for the purpose of supplying the inhabitants of the city with water for domestic use, the extinguishment of fire and other purposes, to the effect that a city was authorized to contract for water rates for private consumers during the life of the franchise, which it could not subsequently reduce before the expiration of the franchise contract, and a subsequent reduction of the rates by the city acting under a subsequent statute authorizing cities to fix rates would work an impairment of the obligation of the water company's contract. Other cases to the same effect are to be found in our points and authorities, and in particular see the recent Washington decision reported in 172 Pac. 890, construing identical provisions.

It must be borne in mind, as said by Justice Moody

in the Home Telephone Company case, "No case, unless it is identical in fact, may serve as a controlling precedent for another." The Illinois cases were decided more upon the interpretation placed by the Supreme Court of Illinois upon charter provisions and general laws of that state than upon the question as one calling for first decision.

As Justice Holmes observes in Water Company v. Tampa, 199 U. S. 242, the Federal Courts will lien towards an agreement of views with the State court if the question seems to them balanced with doubt. In this case there was a change made in rates which it was claimed impaired the obligation of contract, and the prevailing opinion followed the decision of the State court on the question, but the Constitution of Florida contained the provision giving the legislature a continuing power to regulate rates which our constitution does not contain.

It will be noticed that all of the foregoing cases, except the Belfast Water Company case, were cases where the controversy was between the Public Utility rendering services and the State, acting by virtue of its police powers in regulating rates, and it was claimed on behalf of the Public Utility corporation that a change of rates fixed by a franchise contract constituted an impairment of the obligation of a contract, which violated the Constitutional provisions prohibiting the State from passing any law impairing the obligation of a contract. In many of these cases cited, it is seen that the United States Courts have held that these franchise contracts,

where the delegation of a soverign power to regulate rates was sufficient to authorize the fixing of rates could not subsequently be changed or modified without violating the Federal inhibition, so far as the contract of the Public Utility Corporation was concerned.

The foregoing precedents establish the proposition that the city was granted the requisite authority to fix during the life of the franchise the rates it should pay for the service rendered by the water company.

But when confronted with these cases council argues that the provisions of the Federal Constitution, prohibiting the impairment of contracts, does not apply to the contract of a municipal corporation, that the municipal corporation being the mere agent of the State stands in its governmental or public character in no contract relation with its sovereign State, at whose pleasure its charter may be amended, changed or revoked, without the impairment of any constitutional obligation against the impairment of its contracts, and cites the case of New Orleans v. Water Works, 142 U. S. 79-91 as an authority in point.

While the facts in the New Orleans case are quite complicated, and the case was decided rather upon the doctrine of estoppel than upon the question as to whether or not subsequent legislation enacted by the Legislature impaired the contract with the City of New Orleans with the Water Company for furnishing of water, for the court says:

"It does not now lie in the mouth of its coun-

> sel to claim that the obligation of such contract was impaired by subsequent legislation when such legislation was rendered necessary by, or at least was the natural outgrowth of its own repudiation of the contract."

The doctrine announced in the New Orleans case, i. e. that the city being the creature of the State, does not stand in the position to claim the benefits of the Constitutional provision in question, was only a reaffirmance of the principles and distinctions announced in the celebrated Dartmouth College case, 4 Wheaton 518-560-561, and the equally celebrated case of City of Hartford v. Hartford Bridge Company, 10 How. 511-533-534. The distinction was also noted in Fletcher v. Peck, 6 Cranch. 137. The principle has been repeatedly applied since the decision in the New Orleans Water Company case by the United States Supreme Court, and by many of the State Courts.

A more recent case reaffirming the principles which plaintiff in error cited below is City of Worcester v. Worcester R. Co., 196 U. S. 537, as well as in Houck v. Drainage District, 239 U. S. 267.

In all these cases it was contended that the soverign had no right to impair or destroy the contracts made by a municipal corporation, and when retroactive legislation was passed by the Supreme Legislature there was an impairment of the obligation of a contract, and the Supreme Court of the United States held that the Federal provision did not apply to the agencies of a

State; but all of these decisions recognize the principle that a city's proprietory property rights and contracts cannot be diverted by the Legislature, without the impairment of the city's contract in violation of Federal guarantees.

But, assuming that the city's contract in question was subject to modification, or abrogation, as has taken place in this case, under the principles announced in the New Orleans Water Company Case, yet the city's contract under the Constitution of the State of Oregon, as it existed when the contract was entered into, is subject to federal protection, because at the time the contract was entered into between the City and the Water Company, it was provided by the Constitution, making provision for the creation of municipal corporations, that "All laws passed pursuant to this section may be altered or repealed, but not so as to impair or destroy any vested corporate rights."

As we view this provision the framers of the Constitution had in mind to place the city's rights and contracts upon the same plane or grant that a private corporation's rights were placed, or those of a private person. It must not be lost sight of that in each of the earlier cases, where the principle was announced, the Federal Supreme Court expressly limited its decision to cases where there was an absence of Constitutional restriction upon the Legislature from making a modification or change. Here the very restriction noted in these several cases is provided for. The principle is also noted in subsequent cases.

The Hartford Bridge Company case 10 How. 511-533, was one of the celebrated cases of its day, and received extensive discussion both by the people and the profession as to the application of the Federal provisions. It was decided by the Supreme Court of the United States in the December term of the Supreme Court in the year 1850, just a few years prior to the framing and adoption of the Constitution of this State.

Is it not reasonable to believe that men like Judge Deady, Prim, Logan, Boise, and Grover, who sat in the Constitutional Convention, had in mind in framing the Constitution of Oregon to prevent just such a contingency as developed in the Hartford Bridge Company case by the adoption of the provision quoted. There is no reason in principle why a city's contract should not be just as much within the protection of the Federal guarantee as those of a private corporation, if not more so, It certainly has been the subsequent policy of the State of Oregon to completely deprive the Legislature of the State, by the adoption of the Home Rule amendments, of the power to intermeddle with the exercise of municipal powers by cities and towns, and it has been difficult for the State Supreme Court to reconcile the provisions of the State Constitution with existing principles of municipal law, relative to the relation between the State and the municipality, and the power of the State to enact laws, as will be shown by the extreme decision in the case of Rose v. City of Portland, cited by counsel.

The Supreme Court of the State of Oregon has uni-

formily held that the right of municipalities to legislate on municipal affairs is exclusive since the adoption of the Home Rule Amendments: Kalick v. Knapp 73 Or. 558 holding that the legislature cannot constitutionally enact a general law regulating the speed of vehiciles in cities and towns..

Branch v. Albee 71 Or. 188, holding that general act passed by the Legislature providing pensions for policemen was void as a legislature enterference with municipal affairs.

It is also held that Section 2 of Article 11 quoted do not apply to a municipal corporation already chartered, and which under existing laws was entitled to exercise enumerated privileges. Grants Pass v. Public Service Corporation, 87 Or. 637.

We only cite the adoption of the Home Rule Amendments for the purpose of illustrating the limitations which have always been placed upon the legislative powers over municipal corporations in this State, and to show that the charters of existing cities continued in force by virtue of the Amendment. They have always been more circumscribed than they have been in other states. We have expended considerable time in examining into the constitutional provisions of other states, in relation to the creation and organization of municipalities, with a view of discovering whether or not the constitutional provisions of other states contain a like or similar provision to the one found in our state, prohibiting the impairment or destruction of

vested corporate rights. We have gone through the conventional manual of the 6 N. Y. State Constitutional Convention, 1894, which contains a copy of all of the constitutional provisions of the several states existing at that time. We have been unable to find any provision on which is at all similar to the constitution of our state. Practically every constitution provides that all laws in reference to municipal corporations and private corporations may be altered or amended or repealed, but the Constitution of the United States stepped in with a saving clause to these Constitutional provisions as to the enactment of laws impairing the vested rights of private corporations, but it was held that the provision did not apply to municipal corporations, and this suggests that it may be contended by counsel that this provision only relates to private corporations, and not to municipal corporations, but the language of the section will not bear such a construction, because if it intended to confine the operation of this provision to private corporations it would have said so. The words are that "all laws" passed pursuant to this section," etc. Furthermore, there was no necessity of incorporating this provision in this section of the constitution for the protection of the vested rights of private corporations, because the vested rights of private corporations were already protected by the provisions of the Federal Constitution, as have been construed by the United States Supreme Court, as well as by Section 21 of Article I of the State Constitution, prohibiting the impairment of the obligation of contracts and the passage of ex post facto laws.

Judge Sanborn, in the opinion of the Omaha Water Company case, points this distinction out in reference to the Water Company's vested rights.

> "The counsel for the municipality argue that the city was without power to make any irrevocable and unalterable contract regarding rates."

"Because the Constitution provides:

> "No corporation shall be created by special law, nor its charter extended, changed or amended". All general laws passed pursuant to this section may be altered from time to time, or repealed, etc."

In covering the subject the eminent Judge said:

> "Nor does the section of the constitution which provides that general laws affecting the charters of corporations may be altered or repealed condition the validity of the effect of this contract. That section is in pari materia with section 16, Article I, of the same constitution, which prohibits the legislature from passing any law impairing the obligation of contracts, and upon familiar principles the two provisions must be read and construed together. So read they provide that the legislature may make an alteration or repeal of any general law involving the charters of corporations, which does not impair the obligation of

any contract, and that it may make no repeal or alteration of those laws which has that effect."

And this was a principle well understood before Judge Sanborn had occasion to construe the particular constitutional provision in question in the Nebraska case. Hence, there is no reason for the provision, except in order to place the vested rights of a municipality upon the same footing as those of a private corporation, and to take the case out of the operation of the rules that were announced in the Hartford Bridge Company case, so that when a franchise was granted to a city, it would be protected from further tinkering and intermeddling with by members of the legislature who may be actuated by motives that were not for the public interest. It was considered, undoubtedly by the framers of the Constitution that if a city was granted a right to maintain or operate a ferry, as in the Hartford Bridge Company case, or that it had secured certain rights and privileges under prior grants from the legislature, that these rights and grants should be just as much within the protection of Federal guarantees as the organization and property rights of the Dartmouth College, which the legislature attempted to abrogate, and change, and it was held by Chief Justice Marshall and Justice Storey that there was a distinction between the property rights of a charitable and eleomosynary institution, and those of a public municipal corporation, although in subsequent decisions of the Supreme Court of the United States it was pointed out that under

certain chartered cities of earlier times the powers that were granted these corporations were not subject to change or modification by the power of King who granted them, but it was said that this principle was not carried into American jurisprudence, and that the relation between the State and its municipalities was somewhat different. As we have before said, the earllier cases limited the operation of the rule that municipal corporations were not within the protection of the impairment of the obligation of a contract, in cases where there was no constitutional provision restricting or limiting the power of the Legislature to enact laws which would alter, amend or repeal the powers conferred by previous acts of the Legislature. At the expense of being tedious we will take the liberty of quoting a few of the citations from the text.

In the Hartford Bridge Company case, 10 How. 511-33-34, it appears that the City of Hartford was the owner of a ferry franchise, and had been such owner for more than a century. In 1808 a company was organized to build a bridge across the river, which was subsequently completed. In 1818, the Legislature passed an Act which provided for the discontinuance of the ferry. The City of Hartford claim that this law discontinuing the ferry impaired the obligation of its contract. On page 533 the court, speaking through Justice Woodbury, said:

> "But it is not found necessary for us to decide finally on this first and more doubtful question, as our opinion is clearly in favor of

the defendant in error on the other question; vis., that the parties to this grant did not by their charter stand in the attitude towards each other of making a contract by it, much as is contemplated in the Constitution, and as could not be modified by subsequent legislation. The legislature was acting * * here on the one part (*534), and public municpal and political corporations on the other. They were acting, too, in relation to a public object, being virtually a highway across the river, over another highway up and down the river From this standing and relation of these parties, and from the subject-matter of their action, we think that the doings of the legislature as to this ferry must be considered rather as public laws than as contracts. They related to public interests. They changed as those interests demanded. The grantees, likewise, the towns being mere organizations for public purposes, were liable to have their public powers, rights, and duties modified or abolished at any moment by the legislature.

They are incorporated for public, and not private objects, They are allowed to hold privileges or property only for public purposes. The members are not shareholders, nor joint partners in any corporate estate, which they can sell or devise to others, or which can be attached and levied on for their debts.

Hence, generally, the doings between them and the legislature are in the nature of legislation rather than compact, and subject to all the legislative conditions just named, and therefore to be considered as not violated by subsequent legislative changes.

It is hardly possible to conceive the grounds on which a different result could be vindicated, without destroying all legislative sovereignty, and checking most legislative improvements and amendments, as well as supervision over its subordinate public bodies.

Thus, to go a little into details, one of the highest attributes and duties of a legislature is to regulate public matters with all public bodies, no less than the community, from time to time, in the manner which the public welfare may appear to demand.

It can neither devolve these duties permanently on other public bodies, nor permanently suspend or abandon them itself, without being usually regarded as unfaithful, and, indeed, attempting what is wholly beyond its constitutional competency.

It is bound, also, to continue to regulate such public matters and bodies, as much as to organize them at first. **Where not restrained by some constitutional provision, this power is inherent in its nature, design and attitude: and the community possess as**

deep and permanent an interest in such power remaining in and being exercised by the legislature, when the public progress and welfare demand it, as individuals or corporations can, in any instance possess in restraining it."

In Mt. Pleasant v. Beckwith, 100 U. S. 514, the controversy arose over the extinguishment of corporate existence calling for a decision as to the rights of creditors. The court recognized the rule announced in the Hartford Bridge Company case, as well as the holding in the Dartmouth College case. It was held that where no constitutional restriction is imposed the corporate existence and powers of counties, cities and towns are subject to the legislative control of the State creating them. This limitation or distinction was likewise recognized in the case of City of Worcester v. Worcester R. Co., 196 U. S. 539.

From these decisions it is clear that constitutional restrictions can be imposed upon the powers of the legislature, so they may not effect or modify the powers, contracts and incorporeal hereditaments of a municipal corporation, and as we have before observed the framers of the Constitution, undoubtedly, intended to protect the vested or corporate rights of municipal corporations, and the subsequent adoption of the Home Rule Amendments have taken away from the legislature the power to enact any legislation affecting charter power. Further citation of text and authorities are found in our points and authorities.

THE PUBLIC UTILITY ACT DOES NOT PROHIBIT PREFERENCES OR DISCRIMINATORY RATES IN FAVOR OF A MUNICIPALITY.

There are other reasons why the order of the Public Utility Commission, requiring the city to pay the Water Company a rate in excess of the amount fixed in the franchise contract, as before indicated, is in excess of its jurisdiction, and therefore void, and is not binding upon the city, besides the question of the right of the State to impair or abrogate the franchise contract between the city and the Water Company. In fact it is not necessary to the decision of this case to determine whether the State can impair the city's contract, or abrogate its terms. This is because there is no provision in the Public Utility Act which prohibits the city from making a franchise contract which creates an undue preference, or discriminatory rate, in favor of the municipality. The undue preference and unjust and unreasonable discriminations which the act affects, and is directed to prohibit, are those preferences and unjust discriminations which Public Utility Companies made or may attempt to make as between private consumers by charging, receiving or collecting from one consumer a greater or less compensation for any service rendered than it charges, collects, demands or receives from any other consumer for a like and contemporaneous service, under substantially similar circumstances. There is not even a sentence or clause in the act which will bear the construction that contracts between a municipality, in relation to its franchise contracts for the price it

pays for its own private service, can be regulated or abrogated by the powers conferred on the Public Utility Commission, and while we believe that the act can only be construed as having a prospective operation on future contracts made by municipalities in this respect, in so far as the right of a municipality is concerned to demand or receive a free service, or a service at reduced rates, as a consideration for granting the use of the streets to a public service corporation to lay its pipes or mains, in cases where the municipality is invested with power to contract for a public utility, and possibly where the power is not conferred by express legislative delegated authority, yet, whatever may be the proper construction as to whether the act is prospective or retroactive on past contracts, in either event, the Public Utility Act expressly recognizes the right of the Federal Government, **the state and its municipal sub=divisions, to accept, receive, demand any given service from a public utility company, a free service, or a service at reduced rates.** In other words, the latter portion of Sec .63 of the Act, found on page 502, expressly recognizes the common law principle that discriminations by corporations rendering a service affected with a public interest are not opposed to public policy, and are, therefore, not inhibited at common law, as was said in a case where it was claimed a free service contracted for by a municipality prior to the enactment of a Public Utility Act was unlawfully discriminatory, and the franchise contract for free service was abrogated by the enactment of the Public Utility Act. "In the absence of legislation upon the

subject, such discriminations cannot be held illegal as a matter of law, without overturning the foundation upon which the rule was built." And in that State the public law contained no provision sanctioning free or reduced rates in favor of a municipality.

The only section in our Act under which there is the least color of contention that the Commission would have power to change or modify the terms of a franchise contract, providing the terms and conditions upon which the public utility may occupy the streets, or fix a rate or tariff for any given service, is by virtue of Section 61 of the Act, found on page 500 of the 1911 Laws.

This section deals with regulations of a public utility made by a municipality in contracting with a public utility corporation for a public service, and declares that such contract, ordinance or determination shall be **in force** and prima facie reasonable until a complaint is made to the Public Service Commission by a qualified complainant, and the Commission shall then have power to review the contract or regulations, and if it finds the municipal contract or regulation unreasonable, the contract is abrogated, and the finding of the Commission is substituted in lieu of the municipal contract or regulation.

This section is nothing more than a legislative declaration of the principle that a franchise contract, or a municipal regulation, between public service corporation and the municipality fixing rates for private con-

sumers that the State could by virtue of its paramount sovereign authority change the regulation or rate charged private consumers by the Public Service Corporation. This right, as we have seen, only exists in cases where the State has not divested itself of the rate making power, and where it has done so a change of rates for private consumers, other than those fixed by the franchise contract, cannot be made without an impairment of the Public Service Corporation's contract inhibited by Federal guarantees, and under the peculiar provision of the Oregon Constitution, prior to amendment, the municipality's contract as well—or as Judge Harris says in Woodburn v. Public Service Commission, 82 Or. 127:

"When Woodburn granted the franchise to the Telephone Company, the city exercised its municipal right to contract, and it may be assumed that the franchise was valid and binding upon both parties until such time as the State chose to speak; but the city entered into the contract subject to the reserved right of the State to employ its public power and compel a change of rates, and when the State did speak, the municipal power gave way to the sovereign power of the State", citing many authorities.

There is nothing to be found in the section which purports to invest the Public Service Commission with power to change any preferential or discriminatory rate in favor of a municipality. It merely makes that clearer which was already clear before; and removes beyond the pale of doubt, the right of the State, through its dele-

gated commission, to regulate and fix rates by virtue of its sovereign power, in cases where its agency are put in operation by appropriate procedure, and at the same time confirming a municipality's inherent right to contract subject to the reserve power of the State to supervise performance of the contract in the interest of the public.

The authorities are all agreed upon the principle that a free service or reduced rates in favor of the State or municipality is not an unjust or unreasonable discrimination, and opposed to public policy at common law, and in the absence of legislation upon the subject such preferences and discriminations cannot be held illegal as a matter of law. We will quote from a few of the texts and reported cases bearing on this principle. Pond in his work on public utilities, in section 223, chapter XIII, under title "No Discrimination in Service", says:

> "Discrimination in favor of public or charity. A discrimination in rates by way of a reduction for the services rendered for public purposes as well as services rendered charitable institutions in the absence of a statute expresly prohibiting such concessions has been sustained by a number of our courts. Indeed it is not uncommon to provide for free water service for use of the public in connection with the fire department, the parts and similar uses which is treated simply as a part of the consideration for the franchise privileges granted

by the municipality receiving such service."

Wyman in his work on public service corporations, Section 1304, is to the same effect. See excerpt from text found on page .... of the brief.

And more recent cases than those cited in the text of these well known authors are in accord with the statement to be found in the text. A recent authority is the case of Belfast (City of) v. Belfast Water Company,— Me——, 98 Atl. Rep. 738. It appears from an examination of this case that a franchise contract was entered into between the city of Belfast and a Water Company, which, among other provisions, provided that the city should pay a gross sum for water service for its own use for a period of 20 years, and thereafter during the life of the franchise, the city should be extended service free of charge. This franchise contract was entered into prior to the enactment of the Public Utility act in the year 1913. (Session Law 1913, Chapter 129). After the Public Utility Act become effective the Water Company served notice on the city that it would not perform the portion of the contract providing for free service to the city for the reason that under the Public Utility law the company was required to serve all alike. without discrimination, and therefore, the contract was illegal, and unless the city made arrangements to pay a compensation for the service, it would cease to maintain the hydrants or permit their use by the city. The city brought a bill to enjoin the breach of the contract in respect to the provision indicated. The court held:

1. That the provisions of the Public Utility Act forbidding unreasonable preferences did not apply to franchise contracts between the city and water company, for the reason that at common law free service to a municipality was not unlawfully discriminatory.

2. That there was nothing in the Public Utility Act which indicated that the legislation was to have a retroactive effect. But the act indicated that it was to have a prospective operation, which we will discuss later on in this brief.

The court said:

> "Another answer is that free service to the public is not at common law unreasonable, and therefore, unlawfully discrimnatory. The law against unreasonable discrimination rests on public policy. It is forbidden because it is opposed to the interests of the public, which requires that all should be treated alike under like circumstances. Discriminations, however, in favor of the public are not opposed to public policy, because they relieve the people generally of part of their burdens. In the absense of legislation upon the subject such discriminations cannot be held illegal as a matter of law, without overturning the foundation upon which the rule itself is built. New York Tel. Co. v. Siegel Cooper Co., 202 N. Y. 511, 96 N. E. 109, 36 L. R. A. (N. S.) 560. So in Superior v. Telephone Co., 141 Wis. 363, 122 N. W. 1023, a contract binding a tel-

> ephone company to maintain without charge, telephones in public offices of the city, was held not to be invalid as against public policy. (The court quoted from the Wisconsin case and cited a number of authorities). This states the case at common law. If it be said that the common law rule has been abrogated by statute, and that the state under its reserved power may enact regulatory provisions which in effect abrogate the contract, it may be answered that the state has not attempted to do so in this case, except as it may be urged by the public utility statute. Section 31 of that statute prohibits unreasonable preferences. But, as we have seen, discrimination in favor of a municipal corporation is not unreasonable."

The Wisconsin case cited by the Maine Court arose over the contention that a free service extended to the city of Superior was an unjust discrimination as between patrons of the company, and, therefore, invalid.

The case of New York Telephone Company v. Siegel Cooper Company, 202 N. Y. 502, 96 N. E. 109, is a decision of the highest court of that State, concurred in by all Justices. It was claimed that a special reduction of rates provided for in the franchise contract between the Telephone Company and the city of New York was an unjust discrimination as against other patrons. The reduction in favor of the city was twenty-five per cent less than the amount charged other patrons of the

Telephone Company. The court held that such a discrimination was legal, inasmuch as there was no express provision of law inhibiting a preference in favor of the state, and its municipal sub-divisions. The decision is a leading one, and is reported in the select series of cases.

The right of the city to accept free or reduced rates or preferential rates is expressly provided for and confirmed by the provisions of the Oregon Public Utility Act, Section 63 of the Act (Session Laws 1911 page 502) enacts:

> * * * * **"Nothing herein shall prevent the transportation of persons or property or the production, transmission, delivery or furnishing of heat, light, water or power, or the conveying of telegraph or telephone messages within this State free or at reduced rates for the United States the State, or any municipality thereof,** or for charitable purposes, or to employees of any such public utility for their own exclusive use and benefit, nor prevent any such public utility from giving free transportation or service, or reduced rates therefor, to its officers, etc.

This provision is found in the latter part of Section 63 of the Public Utility Act, and is enacted by way of an exception to the first part of the act, inhibiting unjust discriminations. It is obvious, therefore, that the un-

just discriminations referred to in the Act are discriminations between patrons and consumers of the Public Service Company, but not discriminations or preferences in favor of a municipality. Sections 65, 66 and 72, prohibiting undue preferences, rebates, concessions, unreasonable rates, practices and services, not specially designated, etc., bear the same construction. That portion of Section 63 quoted is an express recognition and declaration of the common law principle which did not inhibit discrimination in favor of the public. We believe that it would require an express enactment or provision of the Public Utility Act to give the Public Service Commission of Oregon power and jurisdiction to modify or change a rate or tariff for a public service fixed by a municipality as one of the terms and conditions of its franchise contract between itself as grantor and the public service corporation as grantee. If the act made no provision upon the subject, the right of a municipality to accept and receive a preferential rate or tariff would remain, notwithstanding provisions of the law prohibiting undue preferences and unjust discriminations, and when we take into consideration that there is not an inkling in the title of the Act providing, or purporting to modify the common law rule as stated, or an express provision found in the body of the act inhibiting a preferred rate for the city, and at the same time there is found in the act a provision recognizing the right of the city to accept and receive a preferential rate for service extended itself, it would seem that it was clear beyond doubt that the Commission had exceeded its powers in attempting to modify or change the franchise contract rate to a higher rate than fixed

upon the execution of the contract between the defendant city and plaintiff's predecessors.

It is a familiar rule of law that the sovereign is not bound by the words of a statute, unless it is expressly named, and this rule applies to its agencies, such as counties and municipalities. In that portion of the Act defining discriminations the State or municipalities are nowhere named, and hence they are not within the provisions against discrimination, even if the latter portion of the Act did not expressly except out of the operation of this section discriminations in favor of the State or its municipalities.

The Public Utilities Law of Florida,(Section 8), contains provisions against unlawful discrimination in practically the same words as the Oregon statute, in relation to telephone companies..

The Supreme Court construed this Section in a recent case not yet officially reported. The city of Tampa entered into a franchise contract with a telephone company whereby, in consideration of granting the use of the streets to the telephone company for the purpose of maintaining its poles, etc., the city required the telephone company to render free service to certain city offices, and to the county court house, as well as requiring the telephone company to render services to the city for other purposes at a reduced rate, and less than was charged other patrons who were residing in the city of Tampa. The Public Utility Commission of the State made an order requiring the city to pay the

same rates that private patrons paid for the use of the telephones of the company, on the ground that there was an unlawful discrimination within the meaning of the provisions of the Public Utility Statute, already quoted. The free service, and service at reduced rates, not being discontinued, as required by the order of the Public Utilty Commission, the Commission brought a suit against the telephone company to restrain and enjoin the company from furnishing the city with free service, and services at reduced rates, under the terms of its franchise. There was also a provision to be found in the law more or less to the same effect as Section 61, already quoted, defining the power of municipalities in relation to rate regulations.

The case to which we are referring to is State v. Peninsular Telephone Company, 75 Southern Rep. 201, The Supreme Court of the State said, as to the question involved:

> "The question argued is whether under the statute a telephone company may furnish phones to a municipality for the use of its officers free or at a less rate than is charged the general public."

The court held that unless the city was expressly named in the statute prohibiting discriminations the city was exempted from the provisions of the Act. The court said:

> "A city or a county, being a governmental

> as well as a corporate entity, is in its governmental capacity not a "person or corporation" within the meaning and intent of the above provisions of the statute."

and the court goes on to find that the franchise rights were granted to the company as a part of the consideration for the service rendered, and were of value each, etc.

The rule that a general law of a state does not apply to the state itself, or its agencies, has received recognition by the Oregon Supreme Court on several occasions. In the case of Seaton v. Hoyt, 34 Or. 266, decided in 1899, the rule received express recognition.

The Legislature amended a general law relating to the rate of interest, and the question came up as to whether or not warrants issued by Multnomah County should bear interest fixed by the statute prior to the taking effect of the amendment, or should interest be paid in accordance with the rate provided for in the amendatory act. After citing cases from the United States Supreme Court, wherein it was held that the Government was not required to pay interest on its liabilities, the court said:

> "The rule applies as well to a sovereign state as to the national government. Nor is the state within the purview of a general law regulating the rate of interest upon money due or to become due, and this goes upon the ground that a sovereign is not bound by the words of a statute unless it is expressly named:

(Citing authorities) That the county is but the agent of instrumentality of the state, constituted and employed essentially for the promotion of its general government, and, therefore, subject to like rule and restrictions governing its liabilities as the state, there can be no controversy: 1 Dillon, Mun. Corp., Sec. 23. We take it, therefore, that a county is not liable for the payment of interest under the general provisions of the statute regulating the rate upon the demands enumerated in said section 3587 as an individual would be where there is no contract to pay interest."

POWER OF PUBLIC SERVICE COMMISSION LIMITED TO STATUTORITY AUTHORITY

It may not be amiss to call the court's attention to the extent of the power and jurisdiction of the Public Service Commission, under Public Utility Acts. The Public Service Commission are acting by delegated authority in the performance of their duty. Their powers and jurisdiction are not to be taken by implication, but it only has such jurisdiction as given it by statute. As it derives its powers from statute it has no authority, except such as is expressly conferred upon it. As illustrative of the extent of the powers and jurisdiction of a Public Utility Commission we will quote from the opinions of two reported cases.

In Peoples ex rel, Kelly v. Public Service Commission, 171 App. Div. (N. Y.) 910, holding that an elevator operated by a Real Estate Company between a station and certain heights which it formerly owned, and sold, and for which the company charged one cent for fare for passage to persons to whom it had sold property and five cents to others, was not a public service, falling within the scope of the Public Service Commission Act, the court said:

> "The Public Service Commission only has such jurisdiction as is given to it by statute. It cannot assume jurisdiction over common carriers and other appliances, simply because they are quasi public corporations. This

> elevator, or inclined railroad, however it may be styled, is private property devoted somewhat to public use. But it is not enough to give the Public Service Commission jurisdiction, for many public services are concededly not within the jurisdiction of the Commission."

In Public Utilities Commission v. I. C. R. R. Co., 274 Ill. 41, a question arose as to the power and jurisdiction of the Commission to make an order as to the apportionment of costs between two railroad companies in relation to crossings. The distribution of costs was fixed by statute, but the Commission adopted a different rule than prescribed by statute. In holding that the Commission had erred the court said:

> "The Utilities Commission derives its power only from the statute, and has no authority except such as is expressly conferred upon it, and this being so, it is contended that the order of the Commission setting aside the orders of 1891 and 1909, is void for want of authority."

The jurisdiction of Public Utility Commissions being limited to express statutory powers the order of the Commission, increasing the rate the city should pay for its hydrant service, in excess of the rate fixed in the franchise contract, was beyond its jurisdiction and void.

For further authorities bearing on this point see Paragraph 1 under Points and Authorities.

THE DOCTRINE OF WAIVER, RATIFICATION OR ESTOPPEL CANNOT BE APPLIED.

In respect to the question of equitable estoppel or waiver a great deal may be said, and legions of authorities cited and applied. In the first place the amended answer of the City does not present a question which the court can say as a matter of law constitutes a waiver. Referring to the pleadings covering the resolution of the council requesting an adjustment of the City's water rates, it will be seen that the City expressly alleges that the complaint filed with the Public Utility Commission was designed only to effect the rates between the public consumers and the Salem Water Company, and that it never intended to request any modification of the contract rate fixed for the City's own service. This is apparent in Paragraph VI of the amended answer found on page 31 of the transcript.

In Paragraph VII (transcript page 32) of the amended answer the circumstances of the subsequent adoption of the resolution are detailed. It is alleged that subsequent to the filing of the petition for an adjustment of rates, the Public Utility Commission requested the adoption of a resolution embodying the terms set forth in the resolution subsequently filed with the Commission; that the City Attorney and members of the Council were advised that by the terms of the ordinance granting the Salem Water Company its franchise, the

ordinance could not be amended without the consent of the Salem Water Company; that a request was made by the City to the Water Company to consent and agree before the Public Utility Commission that an adjustment of the rates between the City and the Water Company might be made, but the Water Company refused to join in the resolution or take any action in the premises; that the City represented to the Water Company that it subsequently would take steps to amend the ordinance providing for the rates of its own service, and the Water Company refused to join with the City in said proceedings, and that thereafter, for the purpose of securing and ascertaining the amount of a just and reasonable charge, rate, and tariff, and only as advisory, the City adopted the resolution in question so as to enable the City, if it were subsequently able to secure the consent of the Water Company, to amend its ordinance in accordance with the finding of the Public Utility Commission on the question of a fair and just rate to be paid by the City for its own service; that the City did not agree or contract with the Water Company that it would be bound to agree to any rate fixed by the City in the ordinance under consideration. In other words, the adoption of the resolution was conditional upon the action of the Water Company in joining in with the request embodied in the resolution, and failing in this, the City, for the purpose of ascertaining what would be a reasonable charge to pay for the service of its own hydrants, filed the resolution with the Public Utility Commission. The resolution, therefore, was only advisory, and for the purpose of

securing information as to what would be a reasonable rate for it to pay.

A resolution has never arisen to the dignity of an ordinance or a law, furthermore, the charter of the defendant City directs the method of enacting legislation, and provides that the method should be by ordinance, which shall be read three times and approved by the Mayor before it becomes operative. On page 42 of the transcript the charter method of legislating are to be found. There is no question but any change made in the franchises and contracts with the Salem Water Company is municipal legislation, and which the citizens of the City of Salem under the Constitution have a right to participate in; that is, Section 1-A of Article IV of the Constitution of the State of Oregon reserves to the legal voters of every city the power to refer any measure or law that may be enacted by the city government. There can be no waiver, ratification or estoppel of ultra vires acts of the common council of the City of Salem.

The Public Service Commission had no statutory authority to change or modify the terms of the franchise contract in connection with the rate which the city should pay for its services; likewise, the Common Council of the City had no power or jurisdiction to effect a change in Ordinance 207, and amendments without effecting the changes in accordance with charter procedure for enacting legislation, as well as giving the legal voters of the city an opportunity to confirm the legislation by the referendum. Jurisdiction cannot be conferred by

the City on the Public Service Commission by consent in cases where it does not possess statutory jurisdiction, and obviously there can be no waiver where there is no jurisdiction. See Points and Authorities for decisions covering this point.

Now, the District Court, in its opinion has seen fit to say that the City of Salem invited the action of the Commission in modifying the preferential rate. Such was not the case, and it does not take into consideration, the issues made by the pleading or the existing rights of the parties subsequent to the order of the Commission. The rights of the City in the franchise were muddled by the intermeddling of the Public Service Commission. Under the Public Utility Law it had no jurisdiction to adjust any preferential rates in favor of the City or contract rates made with the Water Company. Its jurisdiction extended only to cases involving the rates between private consumers ,and the Public Utility as we have already seen, and how can there be any waiver or equitable estoppel when the Commission's actions in modifying the rate were beyond its jurisdiction and never assented to by the City unless the City took some affirmative action to the disadvantage of the Company, as if, after the order of the Commission had been made, the City had voluntarily consented to the rates adjudicated by the Commission, the doctrine of estoppel, waiver or ratification might apply, but in this case the point is made that the City never recognized the force of the order and refused to pay the increased toll from the date it went into effect and so notified the defendant in error before its

rights to protect itself became final by the force of the Public Utility Act. The New Orleans Water Company case cited by the Court as sustaining this determination is predicated upon clear principles of equitable estoppel, but that doctrine was only applied because the City of New Orleans by its own actions had caused the Water Company to do certain things it otherwise would not have done.

It must not be lost sight of in considering the question of waiver that it was not known whether the Commission would determine that the contract rate fixed in the franchise contract would be increased or decreased by the findings of the Commission when they would be finally entered or promulgated. This uncertainty placed the Water Company in a position to speculate on the outcome of the determination requested to be made by the City, and if it proved unsatisfactory, to subsequently apply to the court for a review of the order if the rate was decreased below the rate fixed in the franchise contract, or if the rate was found to be benificial or advantageous, to stand on the order and recognize its binding force, and possibly, the City would make no objection, and pay the increase toll. Consequently the Water Company refused to join in the resolution or recognize that the Commission had power to make a finding as to the reasonableness of the franchise rate. Subsequently, when the finding of the Commission increased the franchise rate, it was not disposed to dispute the correctness of the Commission's determination, or that its action was beyond the Com-

the City on the Public Service Commission by consent in cases where it does not possess statutory jurisdiction, and obviously there can be no waiver where there is no jurisdiction. See Points and Authorities for decisions covering this point.

Now, the District Court, in its opinion has seen fit to say that the City of Salem invited the action of the Commission in modifying the preferential rate. Such was not the case, and it does not take into consideration, the issues made by the pleading or the existing rights of the parties subsequent to the order of the Commission. The rights of the City in the franchise were muddled by the intermeddling of the Public Service Commission. Under the Public Utility Law it had no jurisdiction to adjust any preferential rates in favor of the City or contract rates made with the Water Company. Its jurisdiction extended only to cases involving the rates between private consumers ,and the Public Utility as we have already seen, and how can there be any waiver or equitable estoppel when the Commission's actions in modifying the rate were beyond its jurisdiction and never assented to by the City unless the City took some affirmative action to the disadvantage of the Company, as if, after the order of the Commission had been made, the City had voluntarily consented to the rates adjudicated by the Commission, the doctrine of estoppel, waiver or ratification might apply, but in this case the point is made that the City never recognized the force of the order and refused to pay the increased toll from the date it went into effect and so notified the defendant in error before its

rights to protect itself became final by the force of the Public Utility Act. The New Orleans Water Company case cited by the Court as sustaining this determination is predicated upon clear principles of equitable estoppel, but that doctrine was only applied because the City of New Orleans by its own actions had caused the Water Company to do certain things it otherwise would not have done.

It must not be lost sight of in considering the question of waiver that it was not known whether the Commission would determine that the contract rate fixed in the franchise contract would be increased or decreased by the findings of the Commission when they would be finally entered or promulgated. This uncertainty placed the Water Company in a position to speculate on the outcome of the determination requested to be made by the City, and if it proved unsatisfactory, to subsequently apply to the court for a review of the order if the rate was decreased below the rate fixed in the franchise contract, or if the rate was found to be benificial or advantageous, to stand on the order and recognize its binding force, and possibly, the City would make no objection, and pay the increase toll. Consequently the Water Company refused to join in the resolution or recognize that the Commission had power to make a finding as to the reasonableness of the franchise rate. Subsequently, when the finding of the Commission increased the franchise rate, it was not disposed to dispute the correctness of the Commission's determination, or that its action was beyond the Com-

mission's jurisdiction. If the finding had been a reduction from the franchise rate the Company was in a favorable position to apply to the Court for a review of the Commission's order under Section 54 of the Public Utility Act, Providing as follows:

> Section 54. Suits to Set Aside Orders, Procedure, Precedence in Hearing, Burden of Proof.—Any public utility or other person, persons or corporation interested or in affected by any order of the Commission fixing any rate or rates, tolls, charges, schedules, classifications, joint rates or rates, or any order fixing and regulations, practices, act or service, being dissatisfied therewith, may commence a suit in the circuit court of the county in which the hearing was held, against the Commission as defendant to vacate and set aside any such order or specified portion thereof on the ground that the order or portion thereof is unlawful, in which suit a copy of the complaint shall be served with the summons as in a suit of equity. The Commission shall serve and file its answer to said complaint within ten days after the service thereof, whereupon said suit shall be at issue and stand ready for trial upon ten day's notice by either party. All suits brought under this section shall have precedence over any civil cause of a different nature pending in said court, and the circuit court shall always be deemed open for the trial thereof, and the same

> shall be tried and determined as a suit in equity Every such suit to set aside, vacate or amend any determination or order of the Commission or to enjoin the enforcement thereof or to prevent in any way such order or determination from becoming effective, shall be commenced, and every appeal to the courts or right or recourse to the courts shall be taken or exercised within ninety days after the entry or rendition of such order or determination, and the right to commence any such action, proceeding or suit, shall terminate absolutely at the end of such ninety days after such entry or rendition thereof.

But this method of review would not be exclusive. The controversy arising would be one over the terms of the franchise between the city and the Water Company and involving questions between the immediate parties to the franchise contract. These rights could be readily determined in an action at law where the right to trial by jury would be available. The principle that the remedy provided by the Public Utilty Act supra, is not exclusive, is recognized by two decisions construing the Public Utility Act. In California, etc. v. City of Grants Pass 203 Fed. 173, which called for a consideration of the question as to whether the adoption of the Public Utility Act supersededed Charter provisions empowering cities to regulate rates, the Court says:

> "The city has not attempted to revoke or

> annul the franchise under which the plaintiff is maintaining and operating its plant, but only to fix the rates to be charged by it, and hence the validity of such franchise is not involved in this suit, and the adoption of the ordinance of 1912 is but an effort to repudiate the contract of March 29, 1910. The plaintiff has a full, complete, and adequate remedy in an action at law to recover on the contract, in which the rights of the parties can be determined."

See also Woodburn v. Public Service Commission 82 Or. Page 120.

The parties before the Commission were adverse. The city had no financial interest in the returns made upon the capital invested in Water Company or its earnings. It was attempting to secure the best rates possible for its citizens in the performance of its public functions, and to secure by negotiation, it it was possible, to do so, the cheapest rate it could for its own service, and thereby relieve the tax-payers of the city of their burdens. By filing with the Commission the resolution in question it was securing information by experts in the matters of public utilities, as to whether or not, the rate fixed in the franchise for its own service, was reasonable or just. The city could have appealed to the court for a review of this order, if it did not see fit to abide byit, or it could await the subsequent action to be taken by the Water Company in whatever form it might choose.

Under Section 54 of the Public Utility Act quoted, the parties in a proceeding before the Public Utility Commission have ninety days after the order or determination of the Commission becomes effective as time within which to appeal to the courts for a review of the determination of the Commission. On the first day of October, 1914, (Transcript page 75) the Order of the Commission became effective. The city notified the Water Company that it would not be bound by the order of the Commission changing its franchise rate immediately after it went into effect. The Water Company continued to furnish the city hydrants with water. On the first day of November, 1914 the Water Company presented the city with a statement of account for hydrant service for the month of October, 1914, in the sum of $370.00, see Transcript page 15. This gave the Water Company notice in no unmistakeable terms, that, the city did not recognize the validity of the order of the Public Utility Commission in contoversy. The Water Company on this date, had approximately seventeen days as time within which to apply to the court for a review of the findings of the Commission, and if the court would find that the order of the Commission was beyond its jurisdiction, the proceedings before the Commission, would be, remanded by the court, for amendment so as to readjust the rates to be paid by consumers which would not impair the earning capacity of the Water Company on its investment. It was the duty of the Water Company, when it had notice that the city would not recognize the authority of the Commission to make the change in

question, to review the order of the Commission before it became final in respect to other rates. If it choose to permit the order of the Commission to become final, on all its rates it did so at its peril. The Company had notice that the city would not be bound by the order of the Commission. There was no corresponding duty on the part of the city to review the findings of the Commission. The city had a clear right to adopt the course disclosed by this record, i, e, to notify the Water Company that it would not be bound by the order of the Commission changing its contract rate for service, before the order of the Commission became final, and then set up the defense that the order of the Commisdion was beyond its jurisdiction in an action at law to recover for services by the Water Company.

The doctrine of waiver cannot be applied to the facts in this case, for the reason that the parties were adversaries before the Commission and there is nothing to show that the resolution No. 1294 in anything misled the Water Company, or cause it to do any act to its disadvantage that it otherwise would not have done. The Water Company was not before the Commission by its own choice, but it was heralded there in in irtum, it refused to join in the resolution requested by the Commission, and when the Commission made a finding thereon, which was to its advantage, it has sought to secure the benefit of the advantage, when it knew that the city disavowed the binding force of the order, and refused to protect itself by appealing to the courts for a review of the proceedings. It certainly does not

lie in the mouth of the Water Company to say that these facts call for the application of the doctrine of waiver. By assuming this attitude the Water Company has waived any right it had to complain of the action of the city in filing the resolution. If the city had paid the first installment of the increased rate, the first month that it became effective, there is no question in our minds but what the doctrine of waiver or estoppal or ratification could not be applied, because under such circumstances the action of the city would have misled the Water Company to its disadvantage, and its earnings would have been impaired. But when it saw that its earnings would be impaired by the refusal of the city to recognize its binding force it was its duty to speak out, and proceed to protect itself by review under the Act.

The entire record shows that this resolution was intended to be only as advisory to the city, and to enable it to take such future action in reference to its contract with the Salem Water Company as might see fit to do; obviously if the city was paying a rate that was too high the city would prefer to effect a different arrangement with the grantee of its franchise. It is a well known fact that Public Service Commissions are a state agency designed to protect the public against the unjust exactions and unreasonable rates charged the public by public utilities in the absence of statutory or municipal regulations. These Commissions whatever may be, the construction placed by them on their powers and duties, are public servants and their salaries and expenses are paid out of the

public funds of which the taxpayers of the city pay a large proportionate share. Expert accountants and appraisers are employed by the Commission to investigate the affairs of these corporations, and after making an inventory and appraisment of the investment and value of the corporate properties, to determine the rates to be charged the consumer which will yield a fair return on the investment made. Such being the function of the Commission, the city had a legal and moral right to call on the Commission to determine and furnish information as to what would be the just and reasonabe rate for the city to pay defendant in error for hydrant service. This information would place the city in a position to take such future action with the grantee of its franchise as would serve the best interest of its tax-payers, and this, notwithstanding that the Commission was the father of the resolution as alleged.

Woodburn v. Public Service Commission 82 Or. 114, does not control.

Counsel has cited City of Woodburn v. Pubilc Service Commission 82 Or. 114, below as an authority to the effect that municipal franchise contracts, fixing rates for a given service between a municipality and a pubic service corporation are subject to modification by the Public Service Commission, either increasing or decreasing the rates fixed by the franchise contract, when the State chooses to act in regulating rates upon complaint being made by a qualified complainant, and, hence, the Commission was authorized to modify and

change the fixed rates by the franchise contract between the Water Company and the city, notwithstanding it was entered into prior to the enactment of the Public Utility Act. As we understand counsel's contention, the charter provision of the city was not broad enough to authorize it to fix a rate for itself during the life of the franchise. The right to fix rates during the life of the franchise must be granted by the Legislature in express terms, for the power to fix or regulate rates is a continuing one, and all doubts must be resolved against the city. We do not dispute the correctness of the ruling in that case, though we do contend that there was, under the Salem Charter, a sufficient grant of power to fix rates if the city had undertaken to do so, but passing that question, we fail to find anything in the Woodburn case not in harmony with the views here expressed. The principle announced in that case can have no application to the facts presented in this case. The statement of the principle found in that case that all doubts must be resolved against the city does violence to a controversy as between a grantor and grantee of a public franchise. The case is an authority in our favor, because it clearly limits its decision to the question whether the city of Woodburn, which had adopted a charter under the Home Rule Amendment, could grant a franchise to a telephone company and fix the rates for patrons which the State could not afterwards change. The franchise was granted prior to the taking effect of the Public Utility Act. and under a charter adopted pursuant to the Home Rule enactment. The court clearly points

out the distinction between a controversy, as arises in this case, and the Woodburn decision, in two seperate paragraphs in the opinion. On page 127 the court says:

> "The right of the State to regulate rates by compulsion is a **police power**, and must not be confused with the right of a city to exercise its contractual powers to agree with a public service company uppon the terms of a franc chise."

On page 120, the court says:

> "Throughout the discussion it must be borne in mind that the State, acting through the Public Service Commission, is a party to this suit, and consequently judicial precedents, arising out of controversies between none but the immediate parties to a franchise are not controlling here. Moreover the present juncture does not call for a decision of the relative rights of the grantor and grantee of a franchise as between themselvves. Furthermore, the very purpose of this litigation is to determine whether the state has in fact empowered Woodburn to fix a schedule of rates which the State could not afterwards change, and, hence, we must also distinguish all these judicial utterances which followed a finding that the State has actually conferred upon a city the power to unalterably fix the rates to be charged by the grantee of a franchise."

The court held that the power to fix rates did not appertain to the government of a city, nor was it even incident to a grant of authority to the people of a municipality to enact or amend a charter of a city, and that a city, therefore, enacting a charter under the Home Rule Amendment, could not assume unto itself the soverign powers of the state to regulate rates and fix unalterably the rates to be charged, and thus preclude the State from exercising its sovereign powers. Nothing is said about the right of the city to contract between itself and grantee of a franchise for a free service ior a service at reduced rates, and this is the question arising in this controversy.

From the above reasons it is apparent that the order sustaining the demurerr to the amended answer and order allowing judgement on the pleadings and the final judgement are contrary to the Public Utility Act and the decisions of the courts, and the District Court therefore, made error of law in this respect.

Therefore, it is contended that this case should be reversed.

Respectfully submitted,
B. W. MACY and
WM. P. LORD
Attorneys for Plaintiff in Error.

No. 3198

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE CITY OF SALEM, a Municipal Corporation, WALTER E. KEYES, its Mayor, and C. O. RICE, its Treasurer,

PLAINTIFFS IN ERROR,

vs.

SALEM WATER, LIGHT & POWER COMPANY, a Corporation,

DEFENDANT IN ERROR.

BRIEF OF DEFENDANT IN ERROR

Upon Writ of Error to the District Court of the United States for the District of Oregon

---

F. W. BALTES AND COMPANY, PRINTERS, PORTLAND

No. 3198

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE CITY OF SALEM, a Municipal Corporation,
WALTER E. KEYES, its Mayor, and
C. O. RICE, its Treasurer,
PLAINTIFFS IN ERROR,

VS.

SALEM WATER, LIGHT & POWER COMPANY,
a Corporation,
DEFENDANT IN ERROR.

BRIEF OF DEFENDANT IN ERROR

Upon Writ of Error to the District Court of the United States for the District of Oregon

---

F. W. BALTES AND COMPANY, PRINTERS, PORTLAND

No. 3198.

In the United States Circuit Court of Appeals for the Ninth Circuit.

THE CITY OF SALEM, a municipal corporation, WALTER E. KEYES, its Mayor, and C. O. RICE, its Treasurer,
Plaintiffs in Error,

vs.

SALEM WATER, LIGHT & POWER COMPANY, a corporation,
Defendant in Error.

Brief of Defendant in Error Upon Writ of Error to the District Court of the United States for the District of Oregon.

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD:

Wood, Montague & Hunt,
Isaac D. Hunt,
M. M. Matthiessen,
1310 Yeon Building, Portland, Oregon,
for the Plaintiffs in Error.

B. W. Macy, Salem, Oregon,
Wm. P. Lord,
Lewis Building, Portland, Oregon,
for the Plaintiffs in Error.

STATEMENT OF FACTS

The facts upon which the questions here involved arise, appear sufficiently from the record and need, in our judgment, no restatement.

The parties have been designated as they appeared in the lower court.

ARGUMENT

This action was brought by the Salem Water, Light & Power Company to recover for fire hydrant service admittedly furnished by it to the defendant municipality. The amount sued for is based upon a hydrant charge fixed by order of the Public Service Commission of Oregon, promulgated in August, 1914, rather than upon the lower maximum rate fixed in the franchise of 1891.

The ultimate question is whether or not the State of Oregon, through its Public Service Commission, had power to increase the rates to be paid by the city for fire hydrant service over those fixed in the franchise granted the utility by the city. The legality only of the Commission's action is questioned, not its correctness upon the facts submitted to the Commission.

The theory of the defense, as we understand it, is this:

1. By virtue of the grant and acceptance of the franchise ordinance, a contract between the city and the utility arose, the impairment of whose obliga-

tions by the state is inhibited by both the federal and state constitutions.

2. That the Public Utility Act of 1911 (1911 Laws of Oregon, Chapter 279) and the orders of the Commission under it are void insofar as they purport to do away with the right of the city to fire hydrant service at a rate not exceeding the maximum fixed in the franchise, because the power to fix such rates is irrevocably withdrawn from the legislature and vested in the city by virtue of the adoption of the Home Rule Amendment.

3. That the rate for the fire hydrant service to the city, though unreasonable and discriminatory in the sense that it was not adequate for the service rendered, was a matter beyond the jurisdiction of the Public Service Commission, discrimination in favor of the state or its political subdivisions being contrary neither to the common law nor to the provisions of the Public Utility Act.

4. That the Public Utility Act was prospective only in its operation.

These will be considered seriatim.

IMPAIRMENT OF OBLIGATIONS OF A CONTRACT.

Assuming that the franchise ordinance, when accepted, created a contractual relation, can the city, *as against the state,* set up the constitutional guaranties protecting the obligations of a contract?

The City of Salem might undoubtedly have been given authority to negotiate a franchise agreement with a public utility, which, *so far as the utility's rights thereunder were concerned,* would have been conclusive for a reasonable period of time even upon the state.

> "It has been settled by this court that the state may authorize one of its municipal corporations to establish by an inviolable contract the rates to be charged by a public service corporation or natural person for a definite term not grossly unreasonable in point of time, and that the effect of such a contract is to suspend during the life of the contract the governmental power of fixing and regulating the rates. * * * But, for the very reason that such a contract has the effect of extinguishing pro tanto an undoubted power of government, both its existence and the authority to make it must clearly and unmistakably appear and all doubts must be resolved in favor of the continuance of the power."
>
> Home Telephone and Telegraph Co. vs. City of Los Angeles, 211 U. S. 265; 29 Sup. Ct. Rep. 50, 52.

The grant of the power to thus preclude even the state from the exercise of its inherent sovereign right to regulate rates must be clear and unmistakable.

"The surrender by contract of a power of government, though in certain well defined cases it may be made by legislative authority, is a very grave act, and the surrender itself, as well as the authority to make it, must be closely scrutinized. No other body than the supreme legislature (in this case the legislature of the state) has the authority to make such a surrender unless the authority is clearly delegated to it by the supreme legislature. The general powers of a municipality or of any other political subdivision of the state are not sufficient. Specific authority for that purpose is required."

Home Telephone and Telegraph Company vs. City of Los Angeles, 211 U. S. 265; 29 Sup. Ct. Rep. 50, 52.

Milwaukee Electric Railway & Light Co. vs. Railroad Commission of Wisconsin, 238 U. S. 174; 35 Sup. Ct. Rep. 820, 822.

Portland Railway, Light & Power Co. vs. City of Portland, 201 Fed. 119, 125.

Woodburn vs. Public Service Commission, 82 Ore. 114, 123; L. R. A. 1917 C. 98; Ann. Cas. 1917 E. 996.

City of Portland vs. Public Service Commission (Oregon, 1918), 173 Pac. 1178, 1180, 1181.

State vs. Billings Gas Co. (Mont., 1918), 173 Pac. 799, 801.

The first question, therefore, is whether or not at the time of the enactment of the ordinance granting the franchise to plaintiff's predecessor in interest, the City of Salem had been authorized by the legislative assembly to surrender by contract the state's right to regulate rates.

The City of Salem was incorporated by a special act of the legislature, approved by the Governor October 15, 1862 (1862 Special Laws of Oregon, 3). At the time of the enactment of Ordinance No. 207, the franchise ordinance here in question, the charter of the City of Salem (1891 Laws, 1088, 1089) contained the following pertinent provisions:

> "Sec. 6. The mayor and aldermen shall comprise the common council of said city, and at any meeting shall have exclusive power: * * *
>
> "6. To provide for lighting the streets and furnishing the city and the inhabitants thereof with gas or other lights, and with pure and wholesome water, and for such purposes may construct such water, gas or other works, within or without the city limits, as may be necessary or convenient therefor; provided, that the council may grant and allow the use of the streets and alleys of the city to any person, company or corporation who may desire to establish works for supplying the city and the inhabitants thereof with such water or light upon such terms and conditions as the council may prescribe.

"26. To permit, allow and regulate the laying down of tracks, street cars and other railroads upon such streets as the council may designate, and upon such terms and conditions as the council may prescribe; to allow and regulate the erection and maintenance of poles or poles and wires for telegraph, telephone, electric light or other purposes, upon or over the streets, alleys or public grounds of the city; to permit and regulate the use of the streets, alleys and public grounds of the city for laying down and repairing gas and water mains, for building and repairing sewers and the erection of gas or other lights [sic]; to preserve the streets, alleys, side and crosswalks, bridges and public grounds from injury, and prevent the unlawful use of the same, and to regulate their use; to fix the maximum rate of wharfage, rates for gas or other lights, for carrying passengers on street railways, and water rates."

These are, so far as we have been able to ascertain, the only portions of the charter under which it is or plausibly may be claimed that the City of Salem had power to fix the rates to be charged for water for a definite period of time in advance, other than the usual provisions in charters granting authority to contract and to be contracted with, and to sue and be sued. They, we submit, do not authorize the City of Salem by contract to surrender an inherent and highly esteemed power of government, that of

the exercise of the police power to protect the public safety, public health and public morals of its citizens, and especially does this language amount to no such sweeping grant of authority when it is construed with the strictness required by the authorities above quoted, and usual in the interpretation of all municipal charters.

Some of the decided cases will enforce the contention. In the case of Home Telephone and Telegraph Company vs. Los Angeles, 211 U. S. 265; 29 Sup. Ct. Rep. 50, the facts appear to have been as follows:

The City of Los Angeles had granted to one King, the plaintiff's assignor, a franchise to construct and operate a telephone system within the city for a period of fifty years. This franchise was granted by the city acting in accordance with the statute requiring all applications for franchises to be filed with the governing body of the municipality; that advertisement of that fact be then made, describing the character of the franchise to be granted and stating that the franchise would be sold to the highest bidder. This statute also provided that the franchise should be sold to the highest bidder, and that a bond should be given by the purchaser to secure the performance of every term and condition thereof. King was the successful bidder for the particular franchise in question and the franchise as drawn fixed maximum rates for service.

At the time of the enactment of the ordinance granting the franchise and at the time of the enactment of a subsequent ordinance attempting to regulate the rates to be charged by the plaintiff telephone company, the charter of the City of Los Angeles contained the following provision:

> "The council shall have power by ordinance * * * to regulate telephone service and the use of telephones within the city and to fix and determine the charges for telephones and telephone service and connections, and to prohibit or regulate the erection of poles for telegraph, telephone or electric wire in the public grounds, streets or alleys, and the placing of wire thereon * * *."

Under this charter provision it was assumed by the District Court and by the Supreme Court, and agreed between parties to the suit, that the City Council had the power to prescribe charges for telephone service, and further that such power is legislative in its character, continuing in its nature, and capable of being vested in a municipal corporation.

The telephone company took the position, however, that the city had by contract authorized the telephone company to maintain its charges for service at a specified standard and that the subsequent ordinance passed to reduce the rates was, therefore, a law impairing the obligation of an existing contract, contrary to Section 10 of Article I of the Federal Constitution. It also contended that the statute

relative to advertising for bids, etc., impliedly granted the right to contract as to rates for a definite period of time, precluding any subsequent regulation of rates during that period.

The Supreme Court, speaking through Mr. Justice Moody, after an exhaustive examination and discussion of the cases, unanimously determined that, under this charter provision, the City of Los Angeles was not authorized to surrender by contract its power to regulate rates and that, therefore, the appellant's contention that there was an inhibited impairment of the obligation of its contract would have to be denied. The opinion in this cause is exhaustive and valuable because of its comment on prior decisions.

In San Francisco-Oakland Terminal Railways vs. City of Alameda, 226 Fed. 889, the public utility brought a suit to have annulled a municipal ordinance reducing the fares to be charged school children by the plaintiff for transportation furnished. The ground upon which annulment was sought was the alleged impairment of the obligations of the franchise held by the plaintiff. After a consideration of the statutory authority granted the city by its charter, the court decided that the charter did authorize the city to regulate rates but not to barter away its police power, the court saying at page 891:

> "It is apparent that these provisions, especially those of the Civil Code and the charter, while undoubtedly conferring power upon the

> city to regulate rates, are wholly wanting in any expression either directly or by implication indicating a purpose on the part of the legislature to authorize a municipality to restrict or barter away the power there given."

There are several cases which the defendants have and which often are cited as authorities for a liberal construction of the language of the alleged grant of power to surrender temporarily the power to regulate rates. These, however, are all cases where there had been either an express delegation by the legislature to the municipality of power to barter away for the time being the power to regulate rates, or a subsequent legislative ratification. Thus, speaking of Los Angeles vs. Los Angeles City Water Company, 177 U. S. 558; Detroit vs. Detroit Citizens' Street Ry. Co., 184 U. S. 368, 22 Sup. Ct. Rep. 410; Cleveland vs. Cleveland City R. Co., 194 U. S. 517; Cleveland vs. Cleveland Electric Ry. Co., 201 U. S. 529, and Vicksburg vs. Vicksburg Water Works Co., 206 U. S. 496, Mr. Justice Moody, in delivering the unanimous opinion of the court in Home Telephone and Telegraph Company vs. Los Angeles, *supra*, said:

> "The decisions of this court, upon which the appellant relies, where a contract of this kind was found and enforced, all show unmistakably legislative authority to enter into the contract."

It is submitted on this branch of the case that

the language of the charter quoted by us, as well as the language thereof relied upon by the defendants, is not sufficient to constitute an unmistakable or indeed even an apparent grant of power by the state to the City of Salem to bargain away for the time being the rate regulating power of the sovereign state.

But, even if this power was never granted in the first instance, the defendants contend that the legislature subsequently ratified the act of the city in granting the franchise in question. This ratification they attempt to find in Chapter 80 of the Laws of 1911, the pertinent portions of which read as follows:

> "Sec. 1. That any incorporated city or town within the State of Oregon owning, controlling or operating a system of water works * * * for supplying water * * * for its inhabitants and for general municipal purposes, and any person, persons or corporation controlling or operating any water system * * * under contract, lease or private ownership, shall have the right and are hereby authorized and empowered to sell, supply and dispose of water * * * from such system to any person, persons or corporation within or without the limits of such incorporated city or town in which such water * * * system is operated, and to make contracts in reference to the sale and disposal of water * * * from such sys-

tem for use within or without the corporate limits.

"Sec. 2. All contracts or agreements heretofore made and now in effect for the sale and disposal of water * * * *by* incorporated cities and towns, and by any person, persons or corporations operating, controlling, or owning water * * * systems to any person, persons or corporation within or without the limits of such incorporated city or town in which such system is operated, are hereby ratified and declared legal and valid contracts insofar as the right of such city or town to contract with reference to same is concerned."

At first glance this Act would seem pertinent; but a perusal thereof will show that the real occasion for its enactment was either the authorization or the ratification of contracts by cities and towns to supply water to persons living without the limits of the municipality. By Sec. 3229 of Lord's Oregon Laws, cities and towns were authorized "to provide for lighting the streets and furnishing such city or town *and the inhabitants thereof* with gas or other lights, and with pure and wholesome water"; but no power was granted to furnish light or water to persons living beyond the corporate limits, that is, to persons who were not "inhabitants" of the city or town. The same limitation upon the power to provide water will be found in the charter of the City of Salem as it existed in 1891. By that charter

the Mayor and Aldermen were given exclusive power, *inter alia,* "to provide for lighting the streets and furnishing the *city* and the *inhabitants thereof* with gas or other light and with pure and wholesome water."

1891 Laws of Oregon, pp. 1088, 1089.

Inasmuch as the practice had grown up of furnishing water to people resident without the corporate limits, this Act—the Act found in Chapter 80 of the Laws of 1911—was passed to enable cities and towns owning a municipal light or water plant to furnish water to such persons living in close proximity to but beyond the limits of the municipality. Section 2 of the Act ratifies all contracts for the sale and disposal of water or electricity *by* incorporated cities and towns and not contracts for the sale and disposal of water and electricity *to* incorporated cities and towns. We submit that the construction placed upon this Act by defendant's counsel is strained and wholly unwarranted.

But, having now discussed the question of initial authority and subsequent ratification, a perusal of the franchise itself seems appropriate. Such an examination will disclose that the grant is made in Section 1; that the condition and stipulation upon which the grant is made is set out in Section 2, that condition being the furnishing of water free of charge to certain fountains and buildings. Section 3 contains regulatory provisions as to pressure and quality of water, size of mains, etc.

Section 4, the one here involved, reads thus:

> "The said Salem Water Company, their successors or assigns, shall not charge, at any time, higher rates for water than is customarily allowed for water, in towns or cities of like population on the Pacific Coast; but the Salem Water Company, its successors or assigns, shall not at any time, charge more than one dollar and eighty-two cents ($1.82) per month for each hydrant or cistern actually supplied. And the right is hereby reserved by the City of Salem to continue or discontinue, to connect or disconnect any or all hydrants or cisterns connected or which may hereafter be connected with said works; and the City of Salem shall not pay for said hydrants or cisterns, while the same are disconnetced or discontinued."

Plaintiff submits that this fourth section is not even an attempt by the city to bargain away any rate making power of the state or of itself. The provision was inserted by the city simply to mark the maximum rate chargeable by the utility and was inserted in the exercise of the legislative power to fix maximum rates rather than of the power to contract. Consequently, plaintiff contends that the state, in no event, has been precluded from changing the rates, first, because the city had no power to preclude the state, and secondly, because the city has not attempted so to preclude the state.

But, assuming for the purposes of this argument

that the franchise when accepted constituted a contract between the city and the utility, could its impairment by subsequent state action be successfully objected to *by the city?* It may be admitted that franchises are at times contracts whose obligations cannot be impaired without the utility's consent. Indeed, Ordinance No. 207 expressly so stipulates. But the rule is otherwise where the state and the utility consent, and the city alone objects.

> "Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them. For the purpose of executing these powers properly and efficiently they usually are given the power to acquire, hold, and manage personal and real property. The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state. Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the state within the meaning of the Federal Constitution. The state, therefore, at its pleasure, may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other

agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the state is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States."

Hunter vs. Pittsburg, 207 U. S. 161; 28 Sup. Ct. Rep. 40, 46.

Worcester vs. Worcester Consolidated Street Railway Co., 196 U. S. 539; 25 Sup. Ct. Rep. 327, 329.

Portland, etc., R. R. Co. vs. Portland, 14 Ore. 188, 193.

Simon vs. Northrup, 27 Ore. 487, 502.

Portland vs. Public Service Commission (Ore. 1918), 173 Pac. 1178, 1181.

As the Supreme Court of Oregon recently said in rendering its opinion in the so-called "Six Cent Fare Case"—a case of wide public interest and elaborate argument:

"The state, acting by and in the name of its agent, the city, made an agreement with the company. It later created the Public Service Commission, giving it general authority over

all such and kindred matters everywhere in Oregon, except as stated. By this legislation there came into existence a new representative of the state, endowed by it with plenary power, and to which the other party to the so-called agreement applied for a modification thereof. After investigation and deliberation, which may be likened to negotiations between contracting parties, the state, by its agent, the Commission, has consented to a change in the contract, allowing the company to charge an increased rate of fare. Whatever might be said if one of the parties to the contract, without the consent of the other, should attempt to change it, whether by legislation impairing the obligation of the contract or otherwise, it does not apply to the present situation, for, as stated, the contracting parties have themselves agreed to the change."

Portland vs. Public Service Commission (Ore. 1918), 173 Pac. 1178, 1181.

To meet this legal difficulty, the defendants say that, while this doctrine is sound when applied to rights held by a municipality in its governmental capacity, it does not apply to rights held by a city in its private or proprietary capacity, and that the right to get hydrant service at not to exceed the franchise rate was held by the City of Salem in its proprietary capacity.

In answer to these contentions, plaintiff submits

two suggestions. In the first place, if the franchise is to be viewed as an ordinary contract between private individuals, then surely the rates are subject to regulation by the state in the exercise of its police power.

> "If the franchise is deemed to be a contract between the city and telephone company, then the mere fact that it was made prior to the enactment of the public utility statute and before the state attempted to regulate the rates, does not debar the state from increasing the rates fixed in the contract between the parties, for the reason that the law wrote into it a stipulation by the city that the state could, at any time, exercise its police power and change the rates; and therefore, when the state does exercise its police power, it does not work an impairment of any obligation of the contract."

Woodburn vs. Public Service Commission, 82 Ore. 114, 121.

Benwood vs. Public Service Commission (W. Va. 1914), 83 S. E. 295.

In the second place, the rights affected were not held by the city for itself, as is, we think, sufficiently shown by the opinion of the Federal Supreme Court in the analogous case of Worcester vs. Worcester Consolidated Street Railway Co., 196 U. S. 539, 25 Sup. Ct. Rep. 327. The facts there were as follows:

In 1891 the Railway Company had been granted a franchise to lay tracks in the streets of the City of Worcester on condition that block paving be laid and maintained between the rails and for a distance of eighteen inches outside the rails, for the entire distance covered by the tracks. This franchise was duly accepted by the company.

At the time the franchise was negotiated, the City Council was empowered to grant locations for the laying of a railroad "under such restrictions as they deemed the interests of the public may require." State legislation also required that paving of streets occupied by their tracks should be kept in repair by street car companies.

In 1898 the legislature passed an Act purporting to relieve street railway companies of the obligation to keep the paving between their tracks in repair. Thereupon the defendant company refused to further repair the paving between its tracks and the plaintiff city made the necessary repairs and strove to hold the street railway company liable for its cost. The city contended that the subsequent legislation purporting to relieve the street railway company from all obligation to keep the paving in repair was invalid because its effect was to impair the obligations of the contract between the city and the railway company—a case, as Your Honors will observe, directly between the grantor and the grantee of the franchise in question, and therefore pertinent here, despite the distinction attempted to be drawn by defendants.

The Supreme Court said:

"The question then arising is whether the legislature, in the exercise of its general legislative power, could abrogate the provisions of the contract between the city and the railroad company with the assent of the latter, and provide another and different method for the paving and repairing of the streets through which the tracks of the railroad company were laid under the permit of their extended location. We have no doubt that the legislature of the commonwealth had that power. A municipal corporation is simply a political subdivision of the state, and exists by virtue of the exercise of the power of the state through its legislative department. The legislature could at any time terminate the existence of the corporation itself, and provide other and different means for the government of the district comprised within the limits of the former city. The city is the creature of the state. * * *

"In general it may be conceded that it (the municipal corporation) can own private property, not of a public or governmental nature, and that such property may be entitled, as is said, 'to constitutional protection.' Property which is held by these corporations upon conditions or terms contained in a grant, and for a special use, may not be diverted by the legislature. * * *

"It seems, however, plain to us that the asserted right to demand the continuance of the obligation to pave and repair the streets, as contained in the orders or decrees of the board of aldermen granting to the defendant the right to extend the locations of its tracks on the conditions named, does not amount to property held by the corporation, which the legislature is unable to touch, either by way of limitation or extinguishment. If these restrictions or conditions are to be regarded as a contract, we think the legislature would have the same right to terminate it, with the consent of the railroad company, that the city itself would have. These restrictions and conditions were of a public nature, imposed as a means of collecting from the railroad company part, or possibly the whole, of the expenses of paving or repaving the streets in which the tracks were laid, and that method of collection did not become an absolute property right in favor of the city, as against the right of the legislature to alter or abolish it, or substitute some other method with the consent of the company, even though as to the company itself there might be a contract not alterable except with its consent. If this contention of the city were held valid, it would very largely diminish the right of the legislature to deal with its creature in public matters, in a manner which the legislature might regard as for the public welfare."

In the light of the foregoing decisions, our position has been and is that, if the city held any rights by virtue of the franchise, they were held either in its proprietary capacity, in which case they were subject to the police power of the state, despite the constitution's inhibition against the impairment of contract obligations, or in its governmental capacity, in which case the state as principal might waive them without the city's consent. The defendants cannot take both horns of the dilemma, they cannot at once claim the powers of the government and the immunities of a private citizen.

It should be noted that the numerous decisions cited by plaintiffs in error signally fail to support the proposition, essential to maintain their defense in this action, that an agreement with a public service corporation on behalf of the public and for its benefit cannot be modified by the supreme public authority, with the consent of the public service corporation, over the objection of the subordinate public agency which acted on behalf of the company in making the original agreement. Many of the decisions cited recognize the subordinate character of the city's authority in the premises, so clearly and cogently stated by Judge Harris in the Woodburn case, 82 Ore. 114, 128:

> "It may be assumed that the franchise was valid and binding upon both parties until such time as the state chose to speak, but the city entered into the contract subject to the reserved right of the state to employ its police power and

compel a change of rates, and when the state did speak the municipal power gave way to the sovereign power of the state."

Thus, in City of Belfast vs. Belfast W. Co. (Me.), 98 Atl. Rep. 738, the court says:

"The state gave the authority. We are not called upon to consider now whether the state has reserved authority to regulate and control the terms and conditions of service. The state has not yet undertaken to do it in this case."

In State ex rel. vs. Peninsula T. Co. (Fla.), 75 Southern 201, the court says:

"It does not appear that the railroad commissions have exercised their 'power to regulate by reasonable rules the terms of telephone service contracts between telephone companies and their patrons.' Nor does it appear that the defendant telephone company has filed with the commission schedules showing its rates for telephone service."

Similarly, most of the other cases cited arise upon attempts on the part of the city, without intervention of the state or its express authority, to modify its own contracts. In New York Telephone Company vs. Siegel Cooper Co., 202 N. Y. 511; 96 N. E. 109, the court expressly recognizes that the rate claimed is valid "in the absence of legislation."

The few cases in which the authority of the State

Commission to modify rates has been denied usually turn upon particular provisions of constitution or statute whereby the state has in fact expressly exercised its authority in such a way as to withdraw any power in the premises from its commission. Thus, in Superior vs. Douglas County Telephone Company, 141 Wis. 363; 122 N. W. 1023, the law creating the Railroad Commission expressly saved the existing rate contracts.

In Quinby vs. Public Service Commission, 223 N. Y. 244; 119 N. E. 433, the court holds that the Public Service Commission has general jurisdiction over the subject matter but that in the particular instance its rights were foreclosed by the constitutional provision which in effect based authority to make rates upon the consent of the local authority, including the owners of the abutting property.

In State ex rel. vs. Public Service Commission (Wash.), 172 Pac. 890, the language of the legislative act expressly forbade any increase above the five cent fare.

In Public Service Electric Co. vs. Board of Public Utility Commissioners, 88 N. J. L. 603, 96 Atl. 1013, the court merely held that the Utility Act was prospective only and that the board had no power to require acts to be done by injunction or specific performance.

We believe that the overwhelming weight of such authority as bears directly upon the question here, and especially of the later and carefully considered cases in the United States Supreme Court,

supports the position of the plaintiff and sustains its right to collect the rates fixed by the authorized arm of the state.

It should, perhaps, also be added, in view of the argument made by the appellants at pages 48 and 87 of their brief, that in 1911, when the Public Utility Act was enacted, Section 2 of Article XI did not contain the provision that "all laws passed pursuant to this section may be altered, amended or repealed, but not so as to impair or destroy any vested corporate rights." This section, so far as here pertinent, was effective as of December 8, 1910, in the very form set out at page 15 of appellants' brief.

HOME RULE AMENDMENT.

The second position taken by the defendants is that the state has, by special legislative charter, conferred upon the defendant municipality the power to regulate rates, and that subsequently, upon the adoption of the Home Rule Amendment to the constitution (Art. XI, Sec. 2), that grant became irrevocable, because the charter was no longer subject to amendment by the state.

It may be admitted that for a time the Supreme Court was much at a loss to determine the nature and extent of the state's power over the charters of cities and towns. And for a time it looked as if an *imperium in imperio* had been created.

It is, however, now well settled that the legis-

lature of the state may pass general laws affecting the charters of cities and towns.

> "The legislature has the right to pass a general law concerning municipalities, cities and towns; the right is contained in the Constitution; and therefore when the legal voters of a city or town enact or amend a charter they do so subject to the right of the legislature to pass a general law because their right to enact or amend their charter must be exercised 'subject to the Constitution.'"
>
> Rose vs. Port of Portland, 82 Ore. 541, 568.

> "A painstaking investigation by every member of the court confirms our belief in the correctness of the conclusion that the legislature can enact general laws concerning cities and towns and other municipalities. A construction of the Constitution which enables the legislature to pass a general law relating to cities and towns harmonizes the different sections and makes the organic law consistent with itself."
>
> Rose vs. Port of Portland, 82 Ore. 541, 571.
> Portland vs. Public Service Commission (Ore. 1918), 173 Pac. 1178, 1181.
> Colby vs. Medford, 85 Ore. 485, 534.
> Barber vs. Johnson, 86 Ore. 390, 393.

These decisions seriously limit the doctrine of Kalich vs. Knapp, 73 Ore. 558, cited by defendant on page 89 of his brief.

An additional fact worthy of consideration in this connection is this, viz., that rate making is not a matter of purely local or municipal character.

> "The power to regulate rates does not appertain to the government of a city; it is not municipal in character."
>
> Woodburn vs. Public Service Commission, 82 Ore. 114, 126.

"Now, the right to regulate rates of public service corporations is a governmental power vested in the state in its sovereign capacity. It may be exercised by the state directly or through a commission appointed by it, or it may delegate such power to a municipality. But I do not understand that a municipality may assume to itself such power without the consent of the state where there is a general law on the subject emanating from the entire state. It is true that under the Oregon system the legal voters of every city or town are given power to enact and amend their municipal charter, subject to the Constitution and criminal laws of the state. But this does not authorize the people of a city to amend its charter so as to confer upon the municipality powers beyond what are purely municipal or inconsistent with a general law of the state constitutionally enacted. Straw v. Harris, 54 Or. 424, 103 Pac. 777, and Kiernan v. Portland,

57 Or. 454, 111 Pac. 379, 112 Pac. 402, 37 L. R. A. (N. S.) 339. It was so held by the Supreme Court of the state in Riggs v. City of Grants Pass, 134 Pac. 776, where a city attempted to amend its charter so as to authorize its council to incur an indebtedness for the building of railroads. The regulation of fares to be charged by public service corporations is not primarily a municipal matter, but is a sovereign right belonging to the state in its sovereign capacity."

Portland Railway, Light & Power Co. vs. City of Portland, 210 Fed. 667, 672.

City of Portland vs. Public Service Com. (Ore. 1918), 173 Pac. 1178, 1181.

In the light of these authorities, it is settled, in our opinion, that the Public Utility Act is not in conflict with Section 2 of Article XI of the State Constitution, first, because the legislature still can, by general law, amend the charters of cities and towns, and secondly, because rate regulation is not a matter primarily of local or municipal concern.

DISCRIMINATION IN FAVOR OF STATE.

If, however, the defense that the franchise ordinance is a contract, the obligations of which may not be impaired by state legislation, or that the Public Utility Act is void as in conflict with the Home Rule Amendment, be not sustained by this court, the defendants take the further stand that the Public Service Commission had no power to

determine the reasonableness of the rate paid by the city for its fire hydrant service, because a discrimination in rate in favor of the state, or a political subdivision thereof, was not illegal either at common law or under our Public Utility Act.

Discriminations in favor of the state and its political subdivisions were not illegal at common law in the sense that they subjected the utility to any penal consequences. Such discriminations are, moreover, the subject of special provision in Section 63 of our own Public Utility Act. (1911 Laws of Oregon, page 502.)

We wish, however, to call the particular attention of the court to the fact that we are not in any way contesting the right of the city to the free service reserved in its franchise. The order of the Public Service Commission, leaving intact these stipulations of the franchise while correcting the hydrant rates, strongly supports the contention hereinbefore urged that the free service and other provisions made in the first section of the franchise are the only terms and conditions of it and that the hydrant rates subsequently mentioned are merely fixed like any other rates, without even a pretense of the exercise of contractual right. We may add that there is, moreover, nothing before the court from which it can deduce that the hydrant rate fixed by the franchise is a "reduced rate" in the sense that it is lower than that afforded to other customers for like service, which is undoubtedly the meaning of the provision in the Public Utility Act relating

to reduced rates to municipalities. There is nothing before the court from which it can infer that the hydrant rate fixed by the Commission was not so fixed in view of a change in the physical or material facts arising since the original rate was fixed which justifies the changed rates, and indeed we think that such would be the presumption in support of the Commission's action if such support should be required. We call particular attention here to paragraph 17 of the finding of the Commission set forth on page 70 of the Transcript of Record of the plaintiffs in error.

But in what position does the defendant city find itself in urging this want of jurisdiction? It appears in the pleadings that the City of Salem, through its properly constituted authorities, filed a petition with the Public Service Commission making complaint both of the service furnished and rates charged by the plaintiff utility. While the proceedings initiated by the filing of this complaint were pending, upon suggestion of members of the Public Service Commission (Paragraph VII of the amended answer). Resolution No. 1294 was adopted by the City of Salem, with the result that thereupon the Public Service Commission, upon a hearing had and with notice to all parties concerned, proceeded to fix the rates to be charged by public utility to various private consumers in the City of Salem, and also to increase the rates to be charged to and paid by the city for hydrant service. Of the order made by the Public Service Commission

in this hearing, no court review was sought by the City of Salem, nor by plaintiff.

Defendants' counsel seek to escape the effect of this order of the Public Service Commission by arguing the question of whether or not Resolution No. 1294 could possibly have the effect of amending Ordinance No. 207. This question, it seems to us, is not before the court. If Ordinance No. 207 has been changed, or any rights created thereby in favor of the City of Salem have been lost, it is rather by virtue of action taken on the part of the City of Salem in the proceeding before the Public Service Commission, and the consequent order entered by that tribunal. Ultimately, the question is one of power on the part of the Public Service Commission to hear and determine the question of the reasonableness of the rate charged by the plaintiff utility for hydrant service furnished the defendant city.

In our judgment, it will not be necessary to attempt a nice definition of the jurisdiction of the Public Service Commission as established by Chapter 279 of the Laws of 1911. It is sufficient to say that the State of Oregon, through its legislative assembly, has decided that it was expedient for the state to assume the burden of regulating rates charged by public utilities to consumers within the state, and to that end it established a commission, whose procedure and powers were thought peculiarly adapted to the ascertainment of what service was reasonably adequate, and what rates were rea-

sonably fair, not only as between a particular consumer and the utility but also with relation to all other consumers within that territory.

It is sufficient for our purposes to know that the Public Service Commission is the tribunal within this state to which to submit the question of the reasonableness of rates charged for service rendered by any utility within the state.

The City of Salem, recognizing the jurisdiction of this tribunal, did submit to it the question of the reasonableness of the rate charged the city for hydrant service furnished by the plaintiff, and a decision has been had thereon, and it seems to us now too late for the city to question the authority of the tribunal selected by it to hear and determine the question submitted. That tribunal had jurisdiction to hear matters of the very sort here submitted, and the rights of the City of Salem under its franchise, whether held in its proprietary or governmental capacity, were by it voluntarily submitted to the Commission for action. This plaintiff has now for a long time furnished service to private consumers at the rate fixed by the Public Service Commission, and those rates were by the Commission itself placed at a lower figure than they would have been had the Commission not increased the rates to be paid by the City of Salem for the service here in question. (Transcript of Record, pages 70-71.)

Resolution No. 1294 does not even purport to amend Ordinance No. 207, and we do not contend that it does. What we do contend is, that there is

nothing in the charter of the City of Salem requiring it to act by ordinance when it is desired to submit to the Public Service Commission the reasonableness of the rates paid by it for hydrant service; that the city, therefore, did legally submit the question of the reasonableness of these rates to the Commission; and that the latter, having by statute jurisdiction over the plaintiff utility and by consent over the city, had power to hear and determine the question submitted.

Perhaps a word should be said about Section 63 of the Public Utility Act and its provisions as to free service to the state and political subdivisions thereof. As we read this Act, the legislature had one ultimate purpose in mind, namely, the procurement of adequate and uniform service to all consumers of the same class, and at fair and equitable rates equal among all consumers of the same class. To that end the legislature established the Public Service Commission, giving it certain administrative and inquisitorial powers necessary, or at least desirable, for the convenient and ready establishment and maintenance of such uniform service at equal rates to all. Incidentally the legislature also incorporated into the Act certain penal provisions enforceable, not by the Commission, but by the courts of general jurisdiction of the state, and Section 63 of the Act is simply one of those penal sections. By its terms, it exempts from the penal features of the Act the practice of giving service free of charge, or at reduced rates, to the state or

political subdivisions thereof. But we do not believe that this court will hold that Section 63 is in effect a ratification of the contract for hydrant service at reduced rates. All that Section 63 means is that the plaintiff utility was guilty of no infraction of the penal provisions of Section 63 of the Public Utility Act by continuing to furnish hydrant service to the City of Salem at a reduced rate. This section does not mean, in our judgment, that the Public Service Commission has no power to hear and determine the reasonableness of rates charged for service rendered to the state or its political subdivisions, if such consumer voluntarily submits the reasonableness thereof to the Commission. Consequently, we believe that the attack upon the jurisdiction of the Public Service Commission fails.

PUBLIC UTILITY ACT PROSPECTIVE ONLY.

Finally, it is urged by the defendants that the Public Utility Act is purely prospective in its operation and that therefore its enactment did not authorize interference by the Public Service Commission with the franchise rates as fixed long prior to the adoption of the Public Utility Act.

Upon this point we content ourselves with calling this court's attention to what was said in a case decided in July, 1918, by the Supreme Court of Oregon. It was there said:

> "Finally, the complaint urges that the order of the Commission is void because the

Public Utility Act is not retroactive. This contention may be dismissed with the statement that the law does and is designed to deal with conditions as they arise, and to adjust matters relating to concerns serving the public, from time to time as may be required."

Portland vs. Public Service Commission (Ore. 1918), 173 Pac. 1178, 1181.

Woodburn vs. Public Service Commission, 82 Ore. 114.

In each of these cases the order of the Commission affected rates established prior to the enactment of the Public Utility Act and in each of them this identical point was made and overruled by the Supreme Court.

In conclusion we submit that the plaintiff is justified in insisting upon the payment by the City of Salem of the fire hydrant charges fixed by the Public Service Commission. The order fixing these increased rates was the result of an investigation of their reasonableness by the Commission, initiated by the City of Salem, whose representatives were heard upon all matters which they desired to submit. No attempt has ever been made by the City of Salem to directly attack this order, though a statutory method for so doing was available. None of the objections now interposed were urged by the city when it initiated its proceedings against the utility. The utility, therefore, was compelled by the statute to come be-

fore the Public Service Commission and to abide by its orders, and it seems to us an act of bad faith upon the part of the city now to set up these technical and, it seems to us, legally unsupportable grounds, in an effort to evade what we may properly term a fair and equitable charge imposed upon the city by the very tribunal selected by it to sit in judgment upon the very question now in litigation.

Respectfully submitted.

WOOD, MONTAGUE & HUNT,
ISAAC D. HUNT,
M. M. MATTHIESSEN,
Attorneys for Defendant in Error.

No. 3198

IN THE

The United States Circuit Court of Appeals

For the Ninth Circuit

THE CITY OF SALEM, a municipal corporation, WALTER E. KEYES, its Mayor, and C. O. RICE its Treasurer,

Plaintiffs in Error,

vs.

SALEM WATER, LIGHT & POWER COMPANY, a corporation,

Defendant in Error.

Petition for Rehearing

Upon Writ of Error to the District Court of the United States for the District of Oregon

N. D. ELLIOTT, PRINTER, SALEM, ORE.

IN THE

The United States Circuit Court of Appeals

For the Ninth Circuit

THE CITY OF SALEM, a municipal corporation, WALTER E. KEYES, its Mayor, and C. O. RICE its Treasurer,

Plaintiffs in Error,

vs.

SALEM WATER, LIGHT & POWER COMPANY, a corporation,

Defendant in Error.

NAMES AND ADDRESSES OF THE ATTORNEYS OF RECORD

Wood, Montague, Hunt & Cookingham,
Yeon Building, Portland, Oregon, for the
Defendant in Error

B. W. Macy, Salem, Oregon,
Wm. P. Lord, Lewis Building, Portland, Oregon,
for the Plaintiffs in Error.

PETITION FOR REHEARING

Comes now the Plaintiff in Error and most respectfully petitions the Court to set aside the decision made and filed in this cause on the 6th day of January, 1919, affirming the judgement of the Court below and grant a rehearing herein on the following grounds:

I

Error in said decision in holding that the City of Salem's franchise contract with the Water Company was entered into by the City in the exercise of its governmental powers, instead of its private and proprietary capacity.

II

Error in holding that the issues in this case consist of the governmental question of rate regulation, instead of the impairment of the City's contract.

III

Error in holding that the language of Section 4 of Ordinance No. 207, to-wit: "* * * but the Salem Water Company, its successors or assigns shall not at any time charge more than one dollar and eighty-two cents ($1.82) per month for each hydrant or cistern actually supplied," gave to the City of Salem power to lower or alter the hydrant rate prescribed.

IV

Error in holding that the Public Service Commission had or could acquire jurisdiction over the rate prescribed in the City of Salem's Franchise Hydrant Contract.

POINTS AND AUTHORITIES

I

Municipal corporations have a double character: one governmental, legislative or public; the other, proprietary or private. The distinction between these, though sometimes difficult to trace, is highly important, particularly in cases relating to property * * * * *. * * In its proprietary or private character, the powers are conferred upon the municipality for the private advantage of the compact community which is incorporated as a distinct legal personality or corporate individual; and as to such powers and property acquired thereunder, and contracts made with reference thereto, the corporation is to be regarded quo ad hoc as a private corporation * * * * *.

1 Dillon Mun, Corp. 5 Ed. Sec. 109
20 Am. & Eng. Enc. Law, 2 Ed. 1131.
Commissioners vs. Lucas, 93 U. S. 108-115.
Meriwether vs. Garrett, 102 U. S. 472-530.
New Orleans vs. New Orleans Water Company, 142 U. S. 79-91.
Walla Walla vs. Walla Walla Water Co., 172 U. S. 1-10.
Covington vs. Kentucky, 173 U. S. 231-240.

Worcester vs. Worcester Street Railway Co., 196 U. S. 539-551.
Hunter vs. Pittsburg, 207 U. S. 161-179.
Safety Wire & Cable Co. vs. Baltimore, 66 Fed. 140-143.
Illinois Bank vs. Arkansas City, 76 Fed. 271-282.
Willis vs. Commissioners, 86 Fed. 872-876.
Commissioners vs. Geer, 108 Fed. 478-481.
City Water Company vs. Ottumwa, 120 Fed. 309-311.
Little Falls E. & W. Co. vs. Little Falls, 102 Fed. 663-664.
Davenport vs. Buffington, 97 Fed. 234-238.
Omaha Water Co. vs. Omaha, 147 Fed. 1-5.
Winona vs. Botzet, 169 Fed. 321-332-333.
Tuttle vs. Cedar Rapids, 176 Fed. 86-88
Wykes vs. City Water Co., 184 Fed. 752-756.
Southern Telephone Co. vs. Mobile, 162 Fed. 523-531.
Grogan vs. San Francisco, 18 Cal. 590-613.
Hill vs. Boston 122 Mass. 344-359.

II

If a municipality obtains its supply of water or light by a contract with a public service corporation, it acts in its so-called private and proprietary capacity, in negotiating and executing the contract, and in questions arising in performance of the contract the municipality should be treated in the same manner as a

private individual or corporation, and is subject to the same general rules of law, restrictions and responsibilities.

3 Dillon 5 Ed. Sec. 1303 P. 2134.
4 McQuillin Mun. Corp. Sec .1717.
Illinois Bank vs. Arkansas City 76 Fed. 271-282.
Little Falls E. & W. Co. vs. Little Falls 102 Fed. 663-664.
Wykes vs. City Water Co. 184 Fed. 752-756.
Omaha Water Co. vs. Omaha 147 Fed. 1-5.
Wichita Water Co. vs. Wichita 234 Fed. 415-420.
Denver vs. Hubbard 17 Col. App. 346-368.
Indianapolis vs. Gas Co. 66 Ind. 396-403.
Gosport vs. Pritchard 156 Ind. 400-406.
Reed vs. Anoka 85 Minn. 294-298.
Weller vs. Gadsden 141 Ala. 642-658.
Gadsden vs. Mitchell 145 Ala. 137-157.
Lackey vs. Water Co. 80 Ark. 108-125.
State vs. Water Co. 61 Kan. 547-561.

III

In determing the relative rights of the municipality and the grantee of a franchise, the nature of the ordinance must always be taken into consideration. It frequently has a dual character. A corporation organized to supply water or light frequently operates under an ordinance containing not only a grant of the privilege to lay its mains or erect its appliances in the public streets, but also an agreement by the company to furnish, and by the City to receive and pay for a

supply of water or light. An ordinance so framed, is both a grant of a franchise to use the City streets to carry out a public purpose, and a contract by the city for a supply of water or light; and in the application of the provisions of the ordinance to the rights of the municipality and of the company, those provisions which relate to the franchise must be distinguished from those which relate to the contractual obligation.

3 Dillon 5 Ed. Sec. 1304 P. 2145-2146.
State vs. Birmingham Water Co. 185 Ala. 388-402.
Wichita Water Co. vs. Wichita 234 Fed. 415-420.
Vincennes vs. Citizens Gas Co. 132 Ind. 114-121-122.
Kaukauna E. L. Co. vs. Kaukauna 114 Wis. 327-334.

IV

Section 4 of Ordinance No. 207, (page 10-11 of Transcript of Record) reads as follows:

> "The said Salem Water Company, their successors and assigns, shall not charge at any time, higher rates for water than is customarily allowed for water in towns or cities of like population of the Pacific Coast, but the Salem Water Company, its successors or assigns, shall not at any time charge more than one dollar and eighty-two cents ($1.82) per month for each hydrant or cistern actually supplied. * * * * * * *."

The City of Salem had no power under any circumstances at any time to lower that rate without the consent of the Water Company.

Detroit vs. Detroit Street Ry. Co. 184 U. S. 368-389

Cleveland vs. Cleveland Ry. Co. 194 U. S. 517-535-536.

Cleveland vs. Cleveland El. Ry. Co. 201 U. S. 529-539-540.

Vicksburg vs. Vicksburg Water Co. 206 U. S. 496-516.

Omaha Water Co. vs. Omaha, 147 Fed. 1-5.

Birmingham Water Co. vs. Birmingham, 211 Fed. 497-501-510.

Atlantic Coast Ry. Co. vs. Public Utility Board, 89 N. J. L. 407-413.

V

The City's franchise contract with the Water Company is protected from impairment by the Federal Constitution.

Grand Trunk Ry. vs. South Bend 227 U. S. 544-556-558.

VI

The Public Service Commission of Oregon is a quasi Judicial Body created by statute. It has only such powers as are expressly conferred upon it by statute. Its powers are strictly construed. Nothing is presumed in its favor.

Commissioners vs. O. R. & N. Co. 17 Ore. 65-75.
State vs. Corvallis & Eastern Ry. 59 Ore. 450-467.
City of Augusta vs. Lewiston A. W. St. Ry. Co. 114 Me. 24.
Public Service Com. vs. I. C. Ry. 274 Ill. 41.

VII

The Public Utilities Act of Oregon expressly withholds jurisdiction over the City of Salem's and similar contracts from the Public Service Commission. That portion of the Public Utilities Act in question is a portion of Section 63 of Chapter 279 of the General Laws of Oregon for 1911. In so far as it is applicable to the instant case, it reads:

> "Nothing herein shall prevent * * * the furnishing * * * * of water * * * * free or at reduced rates for the United States, the State or any municipality thereof, * *. (It will be found more fully set forth on page 36 of the Transcript of Record.)

VIII

Section 2 of Chapter 80 of the 1911 Session Laws expressly clinches and ties up Salem's Contract. (It will be found fully set forth on page 35 of the Transcript of Record.)

ARGUMENT

We will first analyze the several cases cited by the Court in its opinion herein. We are of the opinion that in none of those cases, are the facts analagous to the case at bar. If this be true, then they are poor precedents in this case. As was said in the case of Home Telephone Co. vs. Los Angeles, 211 U. S. 265: "It is obvious that no case, unless it is identical in its facts, can serve as a controlling precedent for another * * * *." Page 274. With this in mind we will proceed.

Hunter vs. Pittsburg, 207 U. S. 161. There was no issue in that case concerning any contract entered into by Pittsburg, or by the City of Allegheny, in any capacity. Simply the legislative or governmental power of the Legislature to consolidate two contiguous cities. The statements made by the Court in that case, which are quoted in the opinion herein, all refer to the governmental powers conferred upon a municipality. Pages 178-9.

Portland vs. Public Service Commission, Or, 173 Pac. 1178. The only issue in this case was the power of the Commission to regulate the rate of fare charged its patrons by the street car company, when the franchise granted by the City limited the fare to not more than 5 cents. The city was exercising a delegated governmental power, when it granted the franchise and limited the rate of fare. No issue was raised

and no question was presented which involved any charges for services rendered the City of Portland by contract or otherwise.

Woodburn vs. Public Service Commission, 82 Or. 114. This case is similar to the Portland "6 cent fare" case, 173 Pac. supra. It was simply the governmental power to regulate the rates charged by the Telephone company for services rendered its patrons. No issue was raised concerning any charges made to the City of Woodburn under a contract, or otherwise. On page 120, Judge Harris in particularly calling attention to the distinction to be observed in dealing with the rights of a municipality, uses this language: "Throughout the discussion it must be borne in mind that the State, acting through the Public Srvice Commission, is a party to this suit, and consequently judicial precedents arising out of controversies between none but the immediate parties to a franchise are not controlling here." We wish to state that we do not now, and never did question the correctness of the decisions in the Portland 6 cent fare case and Woodburn Telephone case, Supra.

Worcester vs. Worcester St. Ry. Co. 196 U. S. .196. There is a big distinction between the facts in this case and the instant case. In this case, all rights of the Street railway company were derived from and all obligations were imposed by a General Statute of the State of Massachusetts. None whatever from the Charter or an Ordinance of the City of Worcester.

The Board of Aldermen of the City of Worcester had to act under the authority of a State Statute before the Street railway company could acquire any rights in the street. (Page 540-541) Section 32 of Chap. 113 of the Massachusetts Public Statutes made it the duty of every Street Railway company to pave and keep in repair the portion of the street occupied by their tracks, and if an unpaved street, for 18 inches on each side of their tracks. (page 541) This was a statutory obligation. No suggestion of any contractual obligation due the city of Worcester. The order of May 11th, 1891, granting an extension to the Street railway and requiring that block paving shall be laid between the rails and for a distance of 18 inches on the outside of the rails, and in some instances, clear to the curb, was made without any authority on the part of the Board to require paving outside of the rails. (page 541) In 1898, the Massachusetts legislature, by general statute, made provision for a different system of Taxation whereby street railway companies were relieved of their obligation to keep a portion of the street in repair. (Page 542) But they were to remain subject to all legal obligations imposed in the original grants of their locations. (Page 542) Still no suggestion of any contractual obligation due the City of Worcester in any capacity. The Board of Aldermen, in making those grants and extensions, were not acting for the City of Worcester in its proprietary capacity, or by virtue of any power conferred upon the City, or contained in its charter. They were

acting as agents of the State under a general statute, exercising delegated governmental powers. Even if they were municipal officers, they were acting in their governmental capacity. Nothing in this case concerning the price fixed by contract to be paid by the City of Worcester to the street railway company for service rendered by it to the City.

New Orleans vs. New Orleans Water Co. 142 U. S. 79. The facts in this case are very similar to those in the Worcester Street Ry. case, supra. The Water company was incroporated by an act of the legislature. This act gave the Water company a franchise in the streets of New Orleans for 50 years, prescribed the terms and condition of such use of the streets, and prescribed the term' and conditions upon which the company should furnish water to the city. The alleged contract in issue in this case was not entered into by the city at all. It was a legislative contract, so-called, made for the city by the legislature, and was void. Nothing at all like the facts in the instant case.

Home Telephone Co. vs. Los Angeles, 211 U. S. 265. This was a case brought by the Telephone Co. to restrain the enforcement of a city ordinance enacted under delegated authority, fixing the rates to be charged its patrons for service by the telephone company. (Page 270) No issue was raised and no question was presented concerning the price the city had contracted to pay for services rendered to it by the Telephone Company. Nothing but the governmental power to regulate rates was involved in this case.

Milwaukee Electric Ry. Co. vs. Railroad Commissioners, 238 U. S. 174. About the only difference between this case and the Portland 6 cent fare case 173 Pac. 1178 supra, is that in this case the fares were lowered, instead of raised as in that case. The only question here involved was the governmental power to regulate rates. Nothing whatever concerning any contract for services to be rendered to the city of Milwaukee.

In the Brief on the original argument of this case, the City was endeavoring to prevail on several theories. One was that the State had surrendered to the City by Charter granted in 1891, the power to regulate rates. The franchise to the water company having been granted under this charter, it was contended that the state's power to regulate rates was suspended during the life of the franchise. Suffice to say that this point is now abandoned. Another was that the Franchise granted the Water Company was a contract which could not be impaired by the Public Service Commission. These two theories were so blended in the brief as to be somewhat confusing. The issues in this case are as follows; the City of Salem granted a Franchise to the Water Company and prescribed the terms and conditions upon which the company could occupy the streets and public places with its water mains, and in the franchise the city contracted for water for its hydrants at not more than $1.82 per month per hydrant. We maintain that the hydrants contract was entered into by the city in its private and proprietary capacity, and

the Public Service Commission did not have and can not acquire, neither can it have conferred upon it, jurisdiction to impair this contract.

That a city acts in two different capacities, one governmental the other private proprietary, can not be denied. The United States Supreme Court, the various Federal Courts and the different state courts have iterated and reiterated this fact time and again, and there is no dissent or conflict of authority. To dwell upon this point is like trying to prove by an elaborate demonstration, that 2 and 2 make 4.

When a city obtains its supply of water or light by a contract with a public service corporation, it acts in its private and proprietary capacity in negotiating and executing the contract, and in questions arising in the performance of the contract the city should be treated in the same manner as a private individual or corporation. We have cited many cases in support of this statement of the law, but not all of them. There is no dissent nor conflict of authority on this point. To deny that this is the law is to shut one's eyes and maintain that one is blind. What does it mean? What would happen should the state or any of its agencies undertake to impair a contract entered into between two private corporations or two individuals? The Federal Courts would interfere to protect it in a hurry. Then the city of Salem's contract with the Water Company for water for its hydrants should receive the same treatment by this or any other Federal

Court. To say that the city's contract for hydrant service is not of a private proprietary nature, and to aver that it is governmental, is contrary to the holding of every Federal and State Court that has passed upon the point, and is out of harmony with all the enclycopedias and all the text writers who have discussed the point. If the statement of the law under paragraph II of Points and Authorities does not mean that the City of Salem's contract for water is protected by the Federal constitution, then we can not depend upon any statement of the law, no matter in how plain and simple English it may be couched. While the Supreme Court of the United States has not passed directly upon this point, it has repeatedly and upon numerous occassions abstractly affirmed the rule. If the City of Salem's hydrant contract does not come within the rule in question, then it will be impossible to find a case that does. The rule is an empty, useless, meaningless jumble of words. To deny that it is protected by the Federal Guarantees, is to deny the meaning of language of plain import.

Discussing the reason for the rule, Judge Dillon says: "The distinction originated with the Courts to promote justice, * * *. The distinction however, is generally recognized, and it may be invoked as the basis of property rights in favor of the municipality which are not wholly with-drawn from the protection that our constitutions extend to property. This distinction, whatever may be its rationale, is firmly established within the limits shown by the

adjuged cases. It is at the bottom, as we think, judicial legislation imperceptibly evolved in the process of adjudication, but its necessity in order to promote justice, and its salutary operation as applied by the conservatism and intelligence of the Courts, has fully justified its wisdom. It is the law of the land." 1 Dillon Mun. Corp. 5 Ed. Sec. 110 P. 184.

The frequency and regularity with which the United States Supreme Court cites with approval, Judge Dillon's work on Municipal Corporations, places upon it the stamp of supreme judicial authority.

That a city's control over the streets is a governmental function, is undoubted. All authorities and text writers concede this. In granting a franchise for the use of its streets and prescribeing the terms and conditions upon which the streets may be occupied, the city is exercising delegated governmental powers. When it contracts for a supply of water for its own use, or light for lighting its streets, it is exercising its business powers. These two powers are frequently joined in one ordinance. This fact is sometimes confusing. It is a well known fact, which is indisputable, that a State exercises its private business powers when it enters into a contract for water or light for its public buildings and grounds; when it contracts for supplies for its public institutions. Those functions are not legislative or governmental. Who would have the temerity to try to maintain that the Public Service Commission had power and authority to raise or lower

the contract rate against the opposition of either the state or the other party to the contract? Most assuredly it can not impair a City's contract under the same circumstances.

In the case of Kaukauna E. L. Co. vs. Kaukauna, 114 Wis. 327-333-4, the Court said: The ordinance or contract serving as the basis of the rights of the respective parties in this case is one of a character now become very common in this State, where the City acts in a two-fold capacity. First, as a governmental body exercising delegated power of the State, it confers, and limits with conditions, the privilege or franchise to use the public streets, * * * *. In addition to this function as an agent of the State, the City, in the same instrument or ordinance, exercices its function as a business corporation, with power to purchase, contract for, and pay for electric lights for public purposes, and to specify the conditions of such contracting, a power arising under its own charter." The dual character of a franchise ordinance so lucidly set forth in the above quotation states the condition of most franchise ordinances. The franchise in which the City of Salem granted rights to the Salem Water Company and provided for a supply of water for its hydrants, is of exactly this type.

The City of Salem is not contending that it had authority to contract away the power of regulation, either in the express words of the ordinance or by implication from its terms. Sec. 4 of Ord. No. 207

which is the franchise ordinance in question, reads as follows: "The said Salem Water Company, their successors or assigns, shall not charge, at any time, higher rates for water than is customarily allowed for water in towns or cites of like population on the Pacific Coast but the Salem Water Company, its successors or assigns, shall not at any time charge more than one dollar and eighty-two cents ($1.82) per month for each hydrant or cistern actually supplied. And the right is hereby reserved by the City of Salem to continue or discontinue, to connect or disconnect any or all hydrants or cisterns connected, or which may hereafter be connected, with said works; and the City of Salem shall not pay for said hydrants or cisterns, while the same are disconnected or discontinued." By the plain language of this Section there is no attempt, nor is any reserved, to regulate any sort or kind of rates or service, except the rather nebulous one which states that the Water Company shall not charge at any time, higher rates for water than is customarily allowed in towns or cities of like population on the Pacific Coast. This is so indefinite it would be uninforcible as a regulation. While the City of Salem did not surrender all right of fixing terms on which the Water Company could use its streets, for the reason that this is a governmental power, it did make a irrevocable contract with the Water Company for water at not to exceed one dollar and eighty-two cents ($1.82) per hydrant per month. This left no power in the City of Salem to reduce it below that figure without the consent of the Water

Company. This question has been repeatedly passed upon by the United States Supreme Court and by other courts. In the case of Detroit vs. Detroit Street Railway Company, 184 U. S. 368-389, a franchise was granted to the Street Car Company which contained a provision that the rate of fare for a single trip shall not exceed five cents (5ct.) for any distance within the City limits. The City contended that this gave it power to reduce fares below that figure. In construing that portion of the franchise the Court said: "Nor does the language of the ordinance, which provides that the rate of fare for one passenger shall not be more than 5 cents, give any right to the City to reduce it below the rate of 5cts. established by the Company. It is a contract which gives the Company the right to charge a rate of fare up to the sum of 5 cts. for a single passenger, and leaves no power to the City to reduce it without the consent of the Company."

In the case of the Atlantic Coast Railway Co. vs. Public Utilities Commission, 89 N. J. L. 407-413, in construing a similar provision the Court said: "But it is contended that the ordinance does not in fact entitle the Company to charge a 5ct. fare. We see no merit in this contention. The great weight of authority is that an ordinance which provides, as does the one in question, that no more than 5cts. shall be charged, gives the Company a contract right to charge a 5ct. rate, which rate cannot be reduced without the consent of the Company." And so it is in the City of Salem's case. Section 4 of Ordinance No 207 gave the Water

Company an absolute right to charge the City of Salem one dollar and eighty-two cents ($1.82) per hydrant per month, and left no power in the City to reduce it below that rate without the consent of the Water Company. It was a binding contract made by the City in the exercise of its private and proprietary powers.

That the Public Service Commission of Oregon has only such powers as are expressly conferred upon it by the statute creating it, and that its powers are strictly constructed, cannot be denied. At any rate, that is the rule in this state. A number of years ago there was a so-called Railroad Commission in this State whose powers were rather uncertain, owing to the ambiguous language of the act creating it. In the case of Railroad Commissions vs. O. R. N. Co. 17 Ore. 65-75-77, it was contended that some of the ambiguous features of the act creating the board were intended to give it rather broad powers. In discussing this feature of the act Mr. Chief Justice Thayer, on page 75 said: "The first question arising would be, what contention between the Railroad Company and such persons, firms, etc., has it jurisdiction of? The answer to that question cannot be left to speculation. The jurisdiction of such Commissions is not given by implication. Commissions of that character are mere creatures of statute, and possess no power except what the statute expressly confers upon them." Again on page 77 he further observes: "It has for a long time been considered the safer and better rule, in determining questions of juris-

diction of boards and officers exercising powers delegated to them by the legislature, to hold that their authority must affirmatively appear from the commission under which they claim to act. * * * * It is not, it seems to me, requiring too much of the legislative branch of the Government to exact, when it creates a Commission and clothes it with important functions, that it shall define and specify the authority given it so clearly that no doubt can reasonably arise in the mind of the public as to its extent."

In the case of State vs. C. & E. Railway Co. 59 Ore. 450-466-467, in considering the powers of the present Commission Mr. Justice Moore quotes with approval the language of Chief Justice Thayer hereinbefore set forth. These cases expressly show the view the Courts of this State take of the powers of the Public Service Commission.

Examining the Public Utilities Act (Chapter 279, 1911 Session Laws) in the light of these decisions, let us observe what powers are conferred upon the Commission. Sec 25 reads as follows: "(Rate Schedules to Be Filed; Maximum Charges.) Every public utility shall file with the Commission within a time to be fixed by the Commission, schedules which shall be open to public inspection, showing all rates, tolls and charges which it has established and which are in force at the time for any service performed by it within the State, or for any service in connection therewith performed by any public utility controlled or operated by it. The

rates, tolls and charges shown on such schedules shall not exceed the rates, tolls, and charges in force January 1, 1911." Only rates, tolls and charges fixed and established by the utility are here mentioned. No suggestion whatever of contractual obligations.

Sec. 43 reads as follows: "(Commission to Prescribe Reasonable Rates and Regulations.) If, upon such investigation, any rates, tolls, charges, schedules or joint rates, shall be found to be unjust, unreasonable, insufficient or unjustly discriminatory or to be preferential or otherwise in violation of any of the provisions of this Act, the Commission shall have power to fix and order substituted therefor such rate or rates, tolls, charges or schedules as shall be just and reasonable. * * * *." Again we find only rates, tolls, charges or joint rates mentioned in this Section. Nothing whatever concerning contractual obligations.

Sec. 51 reads as follows: "(Commission to Order Substitution of Reasonable Rates and Service, Taking Effect of Order.) Whenever, upon an investigation made under the provisions of this Act, the Commission shall find any existing rate or rates, or any schedule of rates, tolls, charges, joint rate or joint rates, to be unjust, unreasonable, insufficient or unjustly discriminatory or to be preferential or otherwise in violation of any of the provisions of this Act, the Commission shall determine and by order fix reasonable rate or rates, schedule or rates, tolls, charges or joint rates to be imposed, observed and followed in the future in lieu of

those found to be unjust, unreasonable, insufficient or unjustly discriminatory or preferential or otherwise in violation of any of the provisions of this Act." Nothing different is brought within the jurisdiction of the Commission here. Sec. 61 of the Act in defining the powers of municipalities to regulate utilities, only refers to the product or service to be rendered by the utility within the municipality. Nothing concerning rates, tolls and charges. Neither does it mention anything concerning a contract between the municipality and the utility concerning services to be rendered to the municipality in its private and proprietary capacity.

In Sec. 63 among other things, we find this provision: "Nothing herein shall prevent the furnishing of water free or at reduced raes for the United States, the State or any municipality thereof."

Bearing in mind the fact that the Commission has only such powers as were expressly conferred upon it, one can search the Public Utilty Act from beginning to end and find no place where the legislature as inferentially, much less expressly, conferred upon the Public Service Commission, jurisdiction over contracts of municipalities made in the exercise of their private and proprietary powers. Not only is this true, but in Section 63 we have a provision which expressly denies to the Commission jurisdiction over free or reduced rates granted to municipalities. If the Commission viewed the City of Salem's contract with the Water Company

as a reduced rate, this provision in Section 63 expressly deprived it of jurisdiction over the contract rate.

While the statutes of the State of Oregon have expressly deprived the Public Service Commission of jurisdiction over the City of Salem's hydrant contract with the Water Company, it could not have conferred such jurisdiction on the Commission had it sought to do so, for the reason that the contract for water for hydrants was made by the City in the exercise of its private and proprietary powers and is governed by the same rules of law that govern the contracts of private corporations and individuals. At the time the Public Utilities Act was passed, this hydrant contract was an executed contract, and had been for years. Hence, it would have been just as impossible for the legislature to have conferred upon the Public Service Commission power and authority to impair the City's contract, as it would have been to have undertaken to impair the obligation of any other executed contract then existing within the State of Oregon.

Jurisdiction over the City's hydrant contract cannot be conferred upon the Public Service Commission by consent, agreement or waiver of the parties. The rule concerning jurisdiction is concisely stated in 15 C. J. 802, as follows: "It is not within the power of litigants to invest a Court with any jurisdiction or power not conferred on it by law, and accordingly it is well established as a general rule that, where the Court has not jurisdiction of the cause of action or subject matter

involved in a particular case, such jurisdiction cannot be conferred by consent, agreement or waiver." The rule just stated prevails in this State. In the case of Wong Sing vs. Independence, 47 Ore. 231-234, Mr. Justice Moore says: "Jurisdiction of the subject matter of actions depends for its exercise upon a valid grant of power, evidenced by proper legislative enactment. The parties to actions may waive their own rights and confer jurisdiction of their persons by a voluntary appearance , but they are powerless to confer upon any tribunal jurisdiction of an appeal, (the subject matter) because the right to do so is not vested in them." In the case of Catlin vs. Jones, 56 Ore. 492-494, the Court observes: "The plaintiff's counsel were undoubtedly aware of the service on them of the notice of appeal, and, if jurisdiction of the subject-matter could be bestowed on this court by consent, their application for an extension of time to file a brief, in case the motion were denied, and the written consent of defendant's counsel to the request, might have waived the defect of filing a mere copy of the notice of appeal, without any proof of service indorsed thereon. Although jurisdiction of the person might be conferred by acquiescence, that of the subject-matter cannot." These cases show the rule laid down by the Courts of this State.

The case of City of Augusta vs. Street Railway Co. 114 Me. 24-27-28 is a case in many respects like the one at bar. The Public Utilities law of Maine provides that bridges erected by municipalities over which any street railroad passes, shall be constructed and main-

tained in such manner and condition, as to safety, as the Board of Railroad Commissioners may determine. It might require city and street railroads officers to attend a hearing after proper notice to the interested parties. After such hearing, the Commissioners were empowered to determine the repairs, renewals, or strengthening of parts of the bridge, or if necessary, the rebuilding of such bridge, and to determine who should bear the expense of such repairs, renewals, strengthening or rebuilding, or they might apportion such expense between the railroad company and the city. The City of Augusta and the Street Railway Company agreed that a certain bridge needed strengthening and repairing and agreed as to the manner of making such repairs and that the City was to pay the expense in the first instance and the proportion to be paid by each was to be thereafter determined. Being unable to come to an agreement over a just distribution of the costs, the City filed a complaint with the Public Utilities Commission asking the Commission to make such an apportionment of the expenses for the repairs, renewals and strengthening of parts already made, and for such further repairs, renewals or strengthening of parts , as may be ordered, as it shall deem just and fair.

The Commission decided that they had no jurisdiction to apportion the expense of repairs, renewals and strengthening of the bridge already made by agreement of the parties, and for this reason dismissed the petition, and the City of Augusta appealed to the Supreme Judicial Court of that State. The Court said: "We

think the ruling of the Commission was right, The jurisdiction of the Commission is created by a statute. It is limited by statute. The Commission has just the kind and extent of jurisdiction which the statute gives, and no more. * * * * If the parties agree upon repairs, and make all that are necessary, there is no occasion for the Commission to exercise its jurisdiction." The Court further says: "It is argued that the parties may waive preliminary determination, and still call on the Commission for an apportionment. Not so. That would in effect invest the Commission with a power which the statute has not conferred upon it. That cannot be done."

The holding of that case is to the effect that the Public Utilities Commission of Maine had no jurisdiction over a contract made by a city and a public utility, for the reason that the statute creating the Commission had not conferred upon it any such jurisdiction. Further, that such jurisdiction could not be conferred upon the Commission by consent or waiver of either or both parties to the contract. The holding of the Court in that case is directly applicable to the facts in the case at bar, with this difference. The Oregon Commission assumed jurisdiction, where the Maine Commission refused to do so.

The City of Salem is not estopped to deny the jurisdiction of the Public Service Commission over its hydrant contract. 15 C. J. 908 states the rule as follows: "Jurisdiction of the subject-matter cannot be based

on an estoppel of a party to deny it exists * * * ." Hence, the City of Salem is not estopped to question the determination of the Public Service Commission by reason of having adopted and filed resolurtion No. 1294.

It must be borne in mind that the State did not act in this case. It was merely the Public Service Commission upon whom the State had conferred limited powers. It had no jurisdiction beyond those conferred upon it. To contend that the City could agree that the State through the Commission and the Water Company could consent to the modification of the terms of the contract with respect to rates to be charged and paid, is to state a proposition that cannot be maintained, for the reason that it is erroneous, in that it assumes that jurisdiction over the City's hydrant contract, (the subject-matter)could be conferred upon the Public Service Commission by consent or agreement; a proposition no court in America has ever undertaken to maintain. To hold in this case that the City of Salem could consent or agree to the jurisdiction of the Public Service Commission over its hydrant contract, when such jurisdiction has not been conferred upon the Commission by the legislature of the State of Oregon, is not only to construe the legislative acts of this State contrary to the construction placed upon them by the Supreme Court of this State, which Federal Courts are bound to follow, but it is to hold contrary to every federal and state court in the land.

We do not ask the Court for any strained construction of the law nor any legal ledgerdermain; simply the plain language of the statuts as it is written and interpreted by the Courts of this State, and the law applied as it is found in the decisions of all jurisdictions of the United States. To restate the City's case—we have a contract made and entered into by the City in its private and proprietary capacity, under and by virtue of ample charter powers, which, according to the decisions of the Supreme and other Federal Courts, is within the protection of the Federal Constitution against impairment. This is the holding of all the authorities. There are none to the contrary. Our position upon this point is impregnable. Of course, if it be contended that Salem's hydrant contract was not made in the exercise of its private and proprietary powers, there is only one way to meet such a contention, and that is to use the language of Judge Moody in the case of Hunter vs. Pittsburg, 207 U. S. 161, where he said: "There is no way of answering such an argument, except by saying it is not true."

The Public Service Commission of Oregon did not have jurisdiction over the City of Salem's hydrant contract for the reason that it was a contract entered into by the City in its private and proprietary capacity, and was an executed contract years before the Public Utility Act was passed. Hence, had the legislature sought to do so, it would have been legally impossible for the legislature to have conferred upon the Public Service Commission jurisdiction over the contract.

It did not have jurisdiction for the further reason that the legislature did not attempt to confer jurisdiction upon it; and for the further reason that Section 63 of the Public Utilities Act expressly with-holds such jurisdiction from the Commission. The City of Salem could not by consent, agreement or waiver, confer jurisdiction upon the Commission, and is not estopped to deny the jurisdiction of the Commission.

The propositions above set forth are not only abundantly supported by the authorities cited, but by numerous others which the writer did not have time to collate. The law is not doubtful or uncertain. The legal path herein attempted to be pointed out has been travelled so often by the courts of our common country that it is as plain as the Oregon Trail across the Continent in the Fifties.

We feel that the opinion heretofore rendered in this case is erroneous for the reasons above set forth. Owing to the short time the writer has been able to give to this matter, there are many authorities which he was unable to bring to the attention of the Court. We think however, that we have cited sufficient to entitle us to a hearing where we can more fully present the City's case and thus avoid the disastrous effects of this erroneous decision.

Very respectfully submitted,

B. W. MACY

Attorney for Plaintiff in Error.

No. 3199

United States

Circuit Court of Appeals

For the Ninth Circuit.

SHIPOWNERS AND MERCHANTS TUGBOAT COMPANY, a Corporation, Claimant of The American Steam Tug "FEARLESS," Her Boilers, Engines, Tackle, Apparel and Furniture,

Appellant,

vs.

A. H. BULL & COMPANY, Inc., a Corporation,

Appellee.

Apostles on Appeal.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 3199

United States

Circuit Court of Appeals

For the Ninth Circuit.

SHIPOWNERS AND MERCHANTS TUGBOAT COMPANY, a Corporation, Claimant of The American Steam Tug "FEARLESS," Her Boilers, Engines, Tackle, Apparel and Furniture,

Appellant,

vs.

A. H. BULL & COMPANY, Inc., a Corporation,

Appellee.

Apostles on Appeal.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index. Page

Index.

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,031.

A. H. BULL & COMPANY, INC., a Corporation,
Libelant,

vs.

THE AMERICAN STEAM TUG "FEARLESS," Her Boilers, Engines, Tackle, Apparel and Furniture,
Respondent,

SHIPOWNERS AND MERCHANTS TUGBOAT COMPANY, a Corporation,
Claimant.

Praecipe for Apostles on Appeal.

To the Clerk of the Above-entitled Court:

Please prepare transcript of record in this cause to be filed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, upon the appeal heretofore perfected in this court, and include in said transcript the following:

(1) All those papers, documents, and data required by Subparagraph (1) of Section 1 of Rule 4 of the Rules in Admiralty of the United States Circuit Court of Appeals for the Ninth Circuit;

(2) All the pleadings in the cause with the exhibits annexed thereto;

(3) All the testimony and other proofs adduced in the cause, including the testimony taken at the trial, all depositions taken by either party, and ad-

mitted in evidence, and all exhibits introduced by either party, said exhibits to be sent up as original exhibits;

(4) The interlocutory decree;

(5) The stipulation as to damages entered into between the respective parties; [1*]

(6) The memorandum of conclusions filed by the Court in lieu of an opinion in the cause;

(7) The final decree;

(8) The notice of appeal;

(9) The assignments of error;

(10) All stipulations and orders extending time for printing the record and filing and docketing the cause on appeal.

McCUTCHEN, OLNEY & WILLARD,
Proctors for Respondent and Claimant (Appellant).

Service of the within praecipe and receipt of a copy is hereby admitted this 22d day of June, 1918.

PILLSBURY, MADISON & SUTRO,
Proctors for Libelant.

[Endorsed]: Filed Jun. 22, 1918. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [2]

Statement of Clerk U. S. District Court.

Parties.

Libelant: A. H. BULL & COMPANY, INC.

Respondent: The American Steam Tug "FEARLESS," Her Engines, Boilers, Tackle, Apparel and Furniture.

*Page-number appearing at foot of page of original certified Apostles on Appeal.

Claimant: SHIPOWNERS & MERCHANTS TUGBOAT COMPANY, a Corporation.

Proctors for Libelant:

PILLSBURY, MADISON & SUTRO, San Francisco, California.

Respondent and Claimant:

IRA A. CAMPBELL, Esq., and McCUTCHEN, OLNEY & WILLARD, San Francisco, California.

PROCEEDINGS.

1916.

May 18. Filed Libel for damages in the sum of $24,000.00

Issued Monition for the attachment of the Steam Tug "Fearless," which Monition was afterwards [3] on May 23d, 1916, returned and filed with the United States Marshal's Return of service endorsed thereon.

May 19. Filed Claim of Shipowners & Merchants Tugboat Company, a corporation, to Steam Tug "Fearless."

Filed Stipulation (Bond) for the release of the Steam Tug "Fearless," in the sum of $25,000.00.

July 13. Filed Answer.

1917.

May 24. Filed Depositions of Henry McDonald and Sivert Hansen taken on behalf of Libelant.

June 5. This cause this day came on for hearing, the Honorable MAURICE T.

DOOLING, Judge, presiding. After hearing testimony, the cause was continued until June 6th for further trial.

6. This cause this day came on for further hearing and after hearing duly had, it was ordered submitted.

7. Filed two volumes of testimony.

1918.

February 8. The Court this day rendered an opinion in which it was ordered that a Decree be entered in favor of Libelant, and that the cause be referred to a United States Commissioner to ascertain and report the amount due.

13. Filed Interlocutory Decree.

March 25. Filed Stipulation of Proctors as to the amount of damage sustained by Libelant, to wit: $21,747.96 and interest at the rate of six per cent from May 18, 1916. [4]

March 28. Filed Final Decree.

April 6. Filed Bond on Appeal.

8. Filed Notice of Appeal.

June 26. Filed Assignment of Errors. [5]

In the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,031.

A. H. BULL & COMPANY, INC., a Corporation,
Libelant,

vs.

THE AMERICAN STEAM TUG "FEARLESS," Her Boilers, Engines, Tackle, Apparel and Furniture,
Respondent.

Libel of A. H. Bull & Company, Inc.

To the Honorable MAURICE T. DOOLING, Judge of the District Court of the United States, in and for the Northern District of California, First Division.

The libel of A. H. Bull & Company, Inc., a corporation, owner of the steamship "Edith," against the American steam tug "Fearless," her boiler, engines, tackle, apparel and furniture, and against all persons lawfully intervening for their interests in said vessel, alleges as follows:

I.

That at all the times herein mentioned the libelant was and now is a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey, and that at all said times libelant was and now is the sole owner of the steamship "Edith." [6]

II.

That said steam tug "Fearless" at all the times herein mentioned was and now is owned by Shipowners and Merchants Tugboat Company, a corporation duly organized and existing under and by virtue of the laws of the State of California.

III.

That on the 4th day of March, 1916, the said steamship "Edith" was docked on the northwesterly line of Pier 46 in the port of San Francisco, and on the southeasterly side of said slip between Pier 46 and Pier 44; that at said time, and at all the times herein mentioned, the Master of said steamship "Edith" was in charge of said steamship "Edith"; that while said steamship "Edith" was lying in said slip her Master engaged the services of the steam tug "Fearless" for the towing of the steamship "Edith" out of said slip and beyond said docks, so that said steamship "Edith" might thereupon proceed under her own steam to a drydock in the bay of San Francisco; that said tug "Fearless," after taking a seven inch tow-line from the port side of the stern of the steamship "Edith," proceeded so rapidly as to part said seven-inch line before the head-line with which the steamship "Edith" had been moored could be cast off, and the steamship "Edith" drifted across said slip to the northwesterly line of the southerly side of Pier 44; that thereupon said tug "Fearless" took another line from the steamship "Edith" on the starboard side of the stern of the steamship "Edith," and proceeded to tow the steamship "Edith" out of said slip; that thereupon [7] and

without a signal from the Master of the steamship "Edith," and without any signal or warning to the Master of the steamship "Edith" from the Captain of the tug "Fearless," the Captain of the tug "Fearless" caused said tow-line to be cast off; that a signal was at once given to the Master of the steamship "Edith" by the mate of the steamship "Edith," who was standing on the poop-deck, that the said line had been cast off by the Master of the tug "Fearless," and thereupon the Master of the steamship "Edith" forthwith stopped all engines of the "Edith" to prevent said line, which had been cast off by the Master of the "Fearless" as aforesaid, from fouling the propeller of the "Edith"; that a strong ebb-tide was running at the time, and a strong southeasterly wind was blowing, and the "Edith" began rapidly to drift, and while so drifting the Master of the "Fearless" steamed around the port side of the steamship "Edith" passing the steamship "Edith" and intending to take a port bow line and thus tow her ahead; that the Master of the "Fearless" was not prepared with a line and was unable to pass one to the "Edith" in passing her, though requested to do so by the first officer of the "Edith"; whereupon the first officer of the "Edith" passed to the "Fearless" the first line available, and which the exigencies of the situation into which the "Edith" had been put by the manoeuvre of the Master of the "Fearless" required him to seize; that the Master of the "Fearless" thereupon ran at an excessive rate of speed with said line and the same parted; that the steamship "Edith" thereupon crashed into Pier 32

in said Bay of [8] San Francisco and a number of her starboard plates were smashed, and the vessel otherwise damaged, so as to necessitate her being taken to a drydock for repairs.

IV.

The collision of the steamship "Edith" with said Pier 32 was caused by the negligent management and manoeuvring of the tug "Fearless," and of the person or persons in charge of said vessel, in proceeding at an unusual rate of speed with the tow-lines taken from the steamship "Edith" and in dropping the second tow-line taken by said tug "Fearless" without notice to the Master of the "Edith," and in endeavoring to perform the act of towage by taking a stern line, dropping the same and then taking a bow line, all without notice or advice to the Master of the "Edith" of the proposed manoeuvre, and in proceed- at an undue rate of speed with the tow-line passed to the "Fearless" by the steamship "Edith," and in not having a tow-line ready to use in completing the manoeuvre in question; that the person or persons in charge of said steam tug "Fearless" were further negligent in attempting to perform said act of towage in the face of the strong wind that was blowing and the strong ebb-tide that was running; that said wind and tide conditions were known to the person or persons in charge of the said tug "Fearless"; that knowing said wind and tide conditions, said person or persons in charge of said tug "Fearless" carelessly and negligently attempted to tow said steamship "Edith" out of said slip in the manner hereinbefore described, and failed to properly notify the

Master of the steamship "Edith" of the proposed manoeuvre in that respect, [9] and by reason of such want of proper care and skill in navigation on the part of those in charge of the steamship "Edith," said steamship "Edith" was caused to and did collide with said Pier 32 and suffered the damages hereinbefore referred to; that said collision was in no way caused by any careless or negligent action of the Master of the steamship "Edith," or of any other person or persons on said steamship "Edith," or of the officers of the libelant.

V.

That due to the damage herein mentioned, it was necessary for the steamship "Edith" to be placed in a drydock on the 6th day of March, as aforesaid, and to suffer repairs, the reasonable cost of which was Sixteen Thousand Six Hundred Sixty-six and 74/100 Dollars ($16,666.74), and which could not be completed prior to the 16th day of March, 1916; that said steamship "Edith" was under a time charter at the time of the collision hereinbefore referred to, and the value of said steamship "Edith" to the said libelant at the time was Six Hundred Sixty-six and 66/100 Dollars ($666.66) for each day; that by reason of the collision and damage to said steamship "Edith" hereinbefore referred to said steamship "Edith" remained in said drydock for eleven days, and during which time said steamship "Edith" was detained at the port of San Francisco at a loss to libelant of Seven Thousand Three Hundred Thirty-three and 26/100 ($7,333.26); that the total damage to the libelant by reason of said collision was the sum

of Twenty-four Thousand Dollars ($24,000). [10]

VI.

That said steam tug "Fearless" is now lying within the boundaries of the Northern District of California at or near the port of San Francisco; that all and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

WHEREFORE, libelant prays that process in due form of law in accordance with the course of practice of this Court in cases of admiralty and maritime jurisdiction issue against said steam tug "Fearless," her boiler, engines, tackle, apparel and furniture, and that all persons having or claiming any interest in said steam tug "Fearless" be cited to appear and answer the matters herein set forth; that said vessel be condemned and sold to satisfy the claim of libelant, with interest and costs, and that libelant may have such other and further relief as it may be entitled to receive in the premises.

PILLSBURY, MADISON & SUTRO,
Proctors for Libelant. [11]

State of California,
City and County of San Francisco,—ss.

Stewart S. Lowery, being first duly sworn, deposes and says: That he is secretary and treasurer of Willcox, Peck & Hughes; that said Willcox, Peck & Hughes are the agents of the A. H. Bull & Company, Inc., a corporation, the libelant named in the foregoing libel; that affiant makes this verification for and on behalf of said libelant, and knows the facts in said libel set forth upon his own investigation;

that said A. H. Bull & Company, Inc., has no officer within the State of California, and therefore affiant makes this verification on behalf of said libelant; that he has read said libel and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters that he believes it to be true.

STEWART S. LOWERY.

Subscribed and sworn to before me, this 12th day of May, 1916.

[Seal] FRANK L. OWEN,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed May 18, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [12]

In the District Court of the United States of America, Northern District of California.

IN ADMIRALTY—No. 16,031.

A. H. BULL & COMPANY, INC., a Corporation, Libelant,

vs.

THE AMERICAN STEAM TUG "FEARLESS," her Engines, Boilers, etc.

Respondent.

Claim.

To the Honorable Judges of the District Court of the United States for the Northern District of California:

The claim of Shipowners and Merchants Tugboat Company, a corporation organized and existing under and by virtue of the laws of the State of California to the American Steam Tug "Fearless," her tackle, apparel and furniture, now in the custody of the Marshal of the United States for the said Northern District of California, at the suit of A. H. Bull & Company, Inc., a corporation, alleges—

That it is the true and bona fide owner of the said American Steam Tug "Fearless," her tackle, apparel and furniture, and that no other person is owner thereof.

Wherefore, this claimant prays that this Honorable Court will be pleased to decree a restitution of the same to it, the said claimant and otherwise right and justice to administer in the premises.

———————— deposes and says that he was and is the master of said vessel, and that at the time of the said arrest thereof, he was in possession of the same as the lawful bailee thereof for the said owner, and that said owner reside out of the said Northern District of California, and more than one hundred miles from the city of San Francisco, in said district

SHIPOWNERS AND MERCHANTS TUGBOAT COMPANY.

By JOHN W. CURRY,
Its Secretary.

IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
Proctors for Claimant.

Northern District of California,—ss.

Subscribed and sworn to before me this 19 day of May, A. D. 1916.

C. W. CALBREATH,

Deputy Clerk, U. S. District Court, Northern District of California.

[Endorsed]: Filed May 19, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [13]

In the United States District Court, in and for the Northern District of California, First Division.

IN ADMIRALTY.—No. 16,031.

A. H. BULL & COMPANY, INC., a Corporation,
Libelant,

vs.

THE AMERICAN STEAM TUG "FEARLESS," Her Boilers, Engines, Tackle, Apparel and Furniture,
Respondent,

SHIPOWNERS & MERCHANTS' TUGBOAT COMPANY, a Corporation,
Claimant.

Answer.

To the Honorable, the Judges of the United States District Court for the Northern District of California:

The answer of the Shipowners and Merchants' Tugboat Company, a corporation, claimant herein,

to the libel of A. H. Bull & Company, Inc., a corporation, libelant herein, admits, denies and alleges as follows:

I.

Claimant admits the allegations of Article I of said libel.

II.

Claimant admits the allegations of Article II of said libel.

III.

Answering unto the allegations of Article III of said libel, claimant admits that on the 4th day of March, 1916, the steamship "Edith" was on the northwesterly line of pier 46, in the port of San Francisco, and on the southeasterly side of said slip between [14] pier 46 and pier 44; admits that at said time, and at all times herein mentioned, the master of said steamship "Edith" was in charge of said steamship "Edith"; denies that while said steamship "Edith" was lying in said slip her master engaged the services of the steam tug "Fearless" for the towing of the steamship "Edith" out of said slip and beyond said docks, so that said steamship "Edith" might thereupon proceed under her own steam to a drydock in the Bay of San Francisco, and in that behalf alleges the fact to be that the master of said steamship "Edith" engaged the services of the steam tug "Fearless" for the purpose of assisting said steamship "Edith" out of her berth at said pier 46, and into the Hunter Point drydock; denies that said tug "Fearless," after taking a 7-inch tow-line from the port side of the steamship "Edith," proceeded so

rapidly as to part said 7-inch line before the headline with which said steamship "Edith" had been moored could be cast off, and, in that behalf, it admits, however, that upon said "Fearless" beginning to pull on said line taken from the port side of the stern of the "Edith" said line parted, and that, thereupon, said steamship "Edith" drifted across said slip to the northwesterly line of the southerly side of pier 44; admits that thereupon said tug "Fearless" took another line from the steamship "Edith" on the starboard side of the stern of the steamship "Edith," and proceeded to assist said steamship "Edith" out of said slip, but denies that she proceeded to tow the said steamship "Edith" out of said slip, for at all times said "Edith" was working her own engines; denies that thereupon and without a signal from the master of the said steamship "Edith," and without any signal or warning to the master of the steamship "Edith" from the captain of the tug "Fearless," the captain of the tug "Fearless" caused said tow-line to be cast off, [15] and, in that behalf, alleges the circumstances under which said tow-line was cast off to be as hereinafter set forth. Claimant admits that a signal was at once given to the master of the steamship "Edith" by the mate of said steamship, who was standing on the poop-deck, that the tow-line had been cast off by the master of the tug "Fearless," but is without knowledge as to whether or not the master of the steamship "Edith" thereupon and forthwith stopped all engines of the "Edith" to prevent said line, which had been cast off by the master

of the "Fearless," from fouling the propeller of the "Edith"; admits that a strong ebb-tide was running at the time, and a strong southeasterly wind was blowing, and that the "Edith" began rapidly to drift under her stopped propeller, and while so drifting that the master of the "Fearless" steamed around the port side of the steamship "Edith," passing the steamship "Edith" and intending to take a port bow-line, but denies that it was for the purpose of towing her ahead, and, in that behalf, alleges that said maneuver was as hereinafter set forth. Claimant denies that the master of the "Fearless" was not prepared with a line and was unable to pass one to the "Edith" in passing her, and denies that the first officer of the "Edith" requested said tug to pass such a line, except that it does admit that the first officer of said steamship asked said tug to pass a large 12-inch hawser lying on the stern of said tug, but that said hawser was so heavy that the men on the forecastle-head of said "Edith" would not have been able to have taken said hawser aboard, and it would not have been practicable to have passed said large hawser at the time, and that said hawser was not of the character of a towing line suitable for the purpose of performing the maneuver which said tug was about to undertake as hereinafter set forth; admits that the first officer of the "Edith" passed [16] a line to the "Fearless," but is without knowledge as to whether it was the first line available or which the exigencies of the situation required him to seize, but, in that behalf, denies that there were any exigencies of the situation into which the "Edith"

had been put by the master of the tug "Fearless" which required the first officer of said "Edith" to pass the insufficient line which he did; denies that the master of the "Fearless" thereupon ran at an excessive rate of speed with said line, but admits that said line parted admits that thereafter said steamship "Edith" drifted into pier 32 in said Bay of San Francisco. Claimant is without information as to whether or not a number of her starboard plates were smashed, or otherwise damaged, so as to necessitate the steamship being taken to a drydock for repairs. Except as herein expressly admitted, claimant denies each and every of the remaining allegations of said article.

IV.

Answering unto the allegations of Article V of said libel, claimant denies that the collision of the steamship "Edith"with said pier 32 was caused by the negligent management and maneuvering of the tug "Fearless," or of the person or persons in charge of said vessel in proceeding at an unusual rate of speed with the tow-lines taken from the steamship "Edith," or in dropping the second tow-line taken by said tug "Fearless" without notice to the master of the "Edith," or in maneuvering to perform the act of towage by taking a stern-line and dropping the same, and then taking a bow-line, or in proceeding at an undue rate of speed with the tow-line passed to the "Fearless" by the steamship "Edith," or in not having a tow-line ready to use in completing the maneuver in question, and further denies that said collision was in any respect whatsoever caused by

any negligent act in the management or navigation of said tug "Fearless," or of any of the persons in charge of said vessel. Claimant further denies that the alleged [17] maneuvers of said tug were without notice or advice to the master of the "Edith."

Claimant denies that the person or persons in charge of said steam tug "Fearless" were further negligent, or at all negligent, in attempting to perform the said act of towage in the face of the strong wind that was blowing and the strong ebbtide running, and, in that behalf, alleges that at the time the tug was ordered to assist said "Edith," the condition of wind, sea and tide were well known to the master of said steamship "Edith," and said tug was employed to assist said steamship under the conditions then and there existing. Claimant admits that said wind and tide conditions were known to the person or persons in charge of said tug "Fearless," and, in that behalf, alleges that they were equally well known to the master and officers of said steamship "Edith." Claimant denies that knowing said wind and tide conditions said person or persons in charge of said tug "Fearless" carelessly or negligently attempted to tow said steamer out of said slip in the manner thereinbefore in said libel described, or failed to properly notify the master of the steamship "Edith" of the proposed maneuver in that respect; denies that by reason of any want of proper care and skill in navigation, as alleged in said libel, or otherwise, or at all, on the part of the tug "Fearless," said steamship "Edith" was caused to and/or did collide with said pier 32, or suffered damages

thereinbefore in said libel referred to; denies that said collision was in no way caused by careless or negligent action of the master of the steamship "Edith," or of the officers of said steamship, and, in that behalf, alleges that said collision was solely caused by the negligent management, navigation and maneuvering of said steamship "Edith," and the failure to furnish sufficient and proper lines to said tug "Fearless." Except as herein expressly admitted, claimant denies each and every of the remaining allegations of said article. [18]

V.

Answering unto the allegations of Article V of said libel, claimant is without information as to whether or not, due to the damages alleged in said libel to have been suffered by said steamship "Edith," it was necessary for said "Edith" to be placed in drydock on the 6th day of March, as in said libel alleged, or to suffer repairs the reasonable cost of which was $16,666.74, or any sum whatsoever, and which could not be completed prior to the 16th day of March, 1916, and for that reason demands that strict proof of the allegations thereof be made if the same be material.

Claimant is without information as to whether or not said steamship "Edith" was under a time charter at the time of collision thereinbefore in said libel referred to, or whether the value of said steamship "Edith" to said libelant at the time was $666.66 for each day, and for that reason demands that strict proof of each and every of the allegations thereof be made. Claimant is without information as to

whether or not, by reason of the collision and damage to said steamship "Edith" thereinbefore in said libel referred to, said steamship remained in said drydock for eleven (11) days, and is likewise without information as to whether or not, during said alleged time, said steamship "Edith" was detained at the port of San Francisco at a loss to libelant of $7,333.26, or any sum whatsoever, and for that reason demands that strict proof of each and every of the allegations thereof be made if the same be material. Claimant is ignorant as to whether or not the total damage by reason of said collision was the sum of $24,000, or any sum whatsoever, and for that reason demands that strict proof of each and every of the allegations therein be made if the [19] same be material. Except as herein expressly admitted, claimant denies each and every of the remaining allegations of said article.

VI.

Answering unto the allegations of Article VI of said libel, claimant admits that at the time of the filing of said libel said steam tug "Fearless" was lying within the boundaries of the Northern District of California at or near the port of San Francisco, and that all and singular the premises in said libel alleged were within the admiralty and maritime jurisdiction of the United States, but denies that all and singular the premises are true.

Further answering unto the allegations of said libel, claimant alleges:

I.

That on the 4th day of March, 1916, the master of said steamship "Edith" arranged for claimant to

send one of the tugs to assist said steamship that afternoon from its berth on the northerly side of pier 16 to and into Hunter's Point drydock; that at the time said arrangements were effected, strong wind was blowing from the southeast, creating a sea of considerable size on the bay; that thereafter claimant dispatched one of its best harbor tugs, namely the "Fearless," to so assist said steamship "Edith," and upon arriving at said steamship, the officers and crew of the latter passed from the port quarter of said steamship one of the latter's lines, which was made fast to the after towing bitts of the "Fearless"; that, thereafter, as soon as said line was made fast on board said steamship, said tug began to pull on the same, and almost immediately thereafter said line, owing to its rotten condition and insufficient strength, parted, and said steamship "Edith" drifted, with the wind and ebbing tide, across the slip in which [20] she was berthed to the southerly side of pier 44; that a second line was thereupon passed from the starboard quarter of said steamship "Edith" to said tug, and as soon as the same was made fast on board said tug and said steamship, said tug began to pull upon said steamship and the latter at the same time worked her engines astern, the combined efforts gradually backing said steamship out of said slip; that after said steamship had been backed out of said slip and into the bay a sufficient distance to execute the next maneuver, to wit, approximately 700 feet distant from the end of pier 44, said steamship stopped backing her engines, and said tug, as was usual and customary in similar cases,

also stopped her engines and prepared to cast off said line; that the officer stationed on the poop-deck of said steamship thereupon directed his crew to take in said line, and at least one-half of the line that was out was so hauled in by said crew, when said steamship, with her helm to starboard, started her engines ahead, whereupon said line was cast off from said tug. That as soon as said line was let go from said tug, the latter was taken around to the bow of said steamship, and the officer stationed on the forecastle-head of the latter was requested to pass a line to said tug in order that said tug might turn said steamship's head against the tide, sea and wind in the direction in which she was to proceed to said drydock; that for reasons unknown to claimant, the officer and crew of said steamship stationed forward failed to pass said line with required diligence, and during the delay in getting said line out said steamship drifted with the wind, sea and tide, passing the ends of piers 44, 42, 40, 38, 36 and 34, towards pier 32, which projected into the bay beyond the ends of the aforementioned piers; that when about opposite the end of pier 36, the officer and crew on the forecastle-head of said steamship succeeded in passing a line to the said tug, and as soon [21] as it was made fast to the latter's towing bitts, said tug commenced to pull and almost immediately thereafter said line, owing to its rotten condition and insufficient strength, parted; that prior to the parting of said line, and as said steamship was drifting past the ends of said wharves toward pier 32, the master of said tug suggested to the

master of said steamship that he back his engines as it was apparent that owing to the delay of said crew in passing said line said steamship was drifting toward the extending end of pier 32; that the master of said steamship failed and refused, however, to act upon said suggestion, and did not start his engines until as hereinafter mentioned; that following the parting of said second hawser, and before a third hawser could be passed, said steamship "Edith" drifted down upon the corner of pier 32, and then swung around broadside across the end of said pier; that shortly before she struck said pier her engines were started astern, and, thereafter, as soon as she was broadside to said pier, the engines of said steamship were started ahead, and she thereupon proceeded without assistance, and under her own power to Hunter's Point drydock, where she was subsequently docked at 5:30 P. M.

II.

That the existing conditions of wind, weather and tide were fully known to the master of said steamship at the time said tug came to his assistance as ordered, and said movements were in fact made at that time under the master's express orders and directions so that said steamship might reach, as soon as possible, said drydock to which she had been ordered for an earlier docking; that said steamship could only be moved out of said slip at practically right angles to the direction of the tidal currents and sea and wind, and to proceed on her way to Hunter's Point [22] drydock she had to be turned at right angles to the

course which she was forced to take in leaving said slip; that there was but one way in which this could be successfully done, and that was, as said tug attempted to perform said maneuver, and would have successfully accomplished it but for the slowness of the officers and crew of said steamship in passing said head-line and the rotten condition and insufficient strength of the same, by said tug proceeding to the bow of said steamship, taking a line therefrom, and then by said tug heading into said wind, sea and tide, swinging the bow of said steamship in the same direction.

That notwithstanding the slowness and inefficiency with which said line was passed from the bow of said steamship to said tug, during which period said steamship was drifting toward pier 32, as aforesaid, no reason existed why said steamship's engines could not have been worked astern, and said steamship kept away from pier 32 while said hawser was being passed to said tug ahead; that such was the suggestion, as aforesaid, made by the master of said tug to the master of said steamship, and the failure of the master of said steamship to so work his engines before he did was one of proximate causes of her subsequent collision with said pier 32.

That said collision was further caused and contributed to by the failure of said steamship to furnish said tug with sound and seaworthy lines with which to pull upon said steamship instead of the rotten and insufficient ones which were passed to said tug.

That furthermore said collision with said pier

could have been avoided by said steamship dropping her anchors, the opportunity for which was open and obvious to the master of said steamship. [23]

That said collision was not due to any fault or neglect on the part of said tug.

III.

That all and singular the premises are true.

WHEREFORE, claimant prays that the libel herein may be dismissed with costs, and that it may have such other and further relief as may be deemed meet and equitable in the premises.

IRA A. CAMPBELL &
McCUTCHEN, OLNEY & WILLARD,
Proctors for Claimant.

State of California,
City and county of San Francisco,—ss.

W. J. Gray, being first duly sworn, deposes and says:

That he is the vice-president and general manager of the Shipowners & Merchants Tugboat Company, a corporation, claimant herein; that he has read the foregoing answer, knows the contents thereof, and believes the same to be true.

W. J. GRAY.

Subscribed and sworn to before me this 12th day of July, 1916.

[Seal] FRANK L. OWEN.
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Receipt of a copy of Answer hereby admitted this 12th day of July, 1916. Pillsbury,

Madison & Sutro, Proctors for Libelant. Filed Jul. 13, 1916, W. B. Maling, Clerk. By T. L. Baldwin, Deputy Clerk. [24]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Tuesday, the 5th day of June, in the year of our Lord, one thousand, nine hundred and seventeen. Present: the Honorable MAURICE T. DOOLING, District Judge.

No. 16,031.

A. H. BULL & CO., INC.,

vs.

AM. STEAM TUG "FEARLESS," etc. et al.

Minutes of Trial. Dated June 5, 1917.

This cause came on regularly this day for the trial upon the issue joined herein. Oscar Sutro, Esq., appeared on behalf of libelant. Ira A. Campbell, Esq., appeared on behalf of claimant. Libelant introduced in evidence the depositions of Henry McDonald and Sivert Hansen; and rested. John Habacher, George W. Driver, Richard C. W. O. Kraatz, John Taylor, Charles F. Boster, W. M. Randall and W. J. Gray were sworn and testified on behalf of claimant herein, Shipowners & Merchants Tugboat Co. Said claimant introduced in evidence a certain exhibit, which was filed and marked Claimant's Exhibit "A" (Drawing), "B" (Chart of Waterfront). Thereupon the hour of adjournment having arrived, the

Court ordered that this cause be, and the same is hereby continued to June 6th, 1917, at 2 o'clock. [25]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Wednesday, the 6th day of June, in the year of our Lord, one thousand, nine hundred and seventeen. Present: the Honorable MAURICE T. DOOLING, District Judge.

No. 16,031.

BULL & CO., etc.,

vs.

TUG "FEARLESS," etc. et al.,

Minutes of Trial. Dated June 6, 1917.

The hearing of the issues herein was this day resumed. Oscar Sutro, Esq., was present as proctor for and on behalf of libelant. Ira A. Campbell, Esq., was present as proctor for and on behalf of respondent and claimant. Mr. Campbell called C. Randall and Emil A. Sanstrom, each of whom was duly sworn on behalf of claimant and examined, and introduced in evidence on behalf of claimant a certain picture, which was filed and marked Claimants' Exhibit "C" and thereupon rested cause on behalf of claimant and respondent. The matter was then argued by Mr. Sutro and Mr. Campbell and ordered submitted on Points and Authorities to be filed in ten (10), ten (10), and ten (10) days. [26]

United States District Court, Southern District of New York.

A. H. BULL & COMPANY, INC., a Corporation,
Libelant,

against

THE AMERICAN STEAM TUG "FEARLESS," Her Boilers, Engines, Tackle, Apparel and Furniture,
Claimant.

Depositions of Henry McDonald and Sivert Hansen.

Deposition taken in behalf of the libelant on the 20th day of March, 1917, at the office of Messrs. Barry, Wainwright, Thacher & Symmers, 59 Wall Street, New York City, before a notary public.

Appearances:

Messrs. PILLSBURY, MADISON & SUTRO, Proctors for Libelant

(By Messrs. BARRY, WAINWRIGHT, THACHER & SYMMERS (Mr. PRYER and Mr. FARWELL).

Messrs. McCUTCHEN, OLNEY & WILLARD, Proctors for Claimant,

By Messrs. KIRLIN, WOOLSEY & HICKOX (Mr. McGRANN).

It is stipulated that the testimony may be taken pursuant to the annexed stipulation; by a stenographer, signing, filing and certification waived; stenographer's fees to be taxable. [27]

Deposition of Henry McDonald, for Libelant.

HENRY McDONALD, being duly sworn and examined as a witness for the libelant, testifies as follows:

(By Mr. FARWELL.)

Q. What is your name? A. Henry McDonald.

Q. What is you business?

A. Master mariner.

Q. You are master of what steamer.

A. "Helen."

Q. In March, 1916, you were master of what steamer? A. The "Edith."

Q. The steamer "Edith" is owned by what company?

A. A. H. Bull Steamship Company.

Q. Where was the "Edith" on March 4th, 1916?

A. San Francisco.

Q. You were in command of her then?

A. Yes, sir.

Q. When was the "Edith" built?

A. She was launched in 1915, in about August, 1915.

Q. Did you take command of her when she first went into commission? A. Yes.

Q. And you remained continuously in command of her up to and after March 4th, 1916? A. Yes.

Q. On March 4th where was the "Edith" lying in San Francisco harbor? A. At Pier 46.

Q. With her bow in or her stern in?

A. Bow in to the dock.

Q. Which side was alongside of Pier 46?

(Deposition of Henry McDonald.)

A. Port side. [28]

Q. The next pier to the starboard of you,—that is, across the slip was what number? A. No. 44.

Q. And the piers decreased in number as you went further along to the right?

A. Yes, sir, as far as Market Street, decreased.

Q. What was the general direction in which the bow of the "Edith" was pointing as you lay alongside the pier? A. In a southerly direction.

Q. Had you intended to move your steamer on that day? A. Yes.

Q. Where did you intend to go?

A. To the drydock, Hunter's Point.

Q. That lies in which direction from Pier 46?

A. To the eastward, in an easterly direction.

Q. That would be towards your port hand the way your steamer was heading?

A. Towards the port hand, yes.

Q. Did you make any arrangements about tugboats to move you?

A. Yes, I engaged a towboat to help me to the drydock.

Q. How did you engage him—by letter.

A. No, by 'phone.

Q. Do you remember when you telephoned?

A. No, it was either the morning of the 4th or the afternoon of the 3d.

Q. And what did you ask them to do?

A. That they would have a boat ready to help me to the drydock.

Q. And did they send a tugboat? A. Yes. [29]

(Deposition of Henry McDonald.)

Q. What one? A. The "Fearless."

Q. What time did she arrive where your steamer was?

A. In the neighborhood of 3:30 or 4 P. M.

Q. In the afternoon? A. Yes.

Q. Were you ready to move out in the stream when the tugboat arrived?

A. No, we were ready about 20 minutes after she arrived.

Q. After the tugboat arrived just tell us what happened?

A. Well, when we got ready to leave or just before we were ready to leave the tugboat took a line from our quarter.

Q. Which quarter?

A. Starboard quarter, I think it was.

Q. What kind of a line was it?

A. A seven-inch line.

Q. Made of what material?

A. Manila, and apparently he got out of position and in trying to gain his position again he put a great strain on the line and carried it away.

Q. What do you mean by "he got out of position"?

A. Well, he dropped down; instead of remaining astern of us he dropped down in the center of the slip with his boat; there was a strong wind and current, of course.

Q. And then he headed—

A. Headed out towards the north.

Q. And the line parted while he was—

(Deposition of Henry McDonald.)

A. The line parted while he was engaged in getting back in position.

Q. Had you cast off your lines from the dock at that time?

A. The stern lines had been slackened off. [30]

Q. How about the bow-lines, at the time that the lines parted, at the time he started on?

A. The lines had been slackened off aft, and the stern had drifted somewhat across the slip, and in order to allow her to go over squarely on No. 44 dock we slackened her bow-lines.

Q. But at the time the "Fearless" started out with this first hawser that she took, were your bow-lines cast off? A. No, our bow-lines were fast then.

Q. Did you give the "Fearless" any signal to go off? A. No.

Q. Do you know whether anyone on your ship did?

A. I don't think so.

Q. This seven-inch line was intended for what purpose? A. Mooring purposes.

Q. I mean on this particular day, was that the tow-line that you expected the tug to take and tow you out in the stream with? A. Yes.

Q. What was its condition? A. Good condition.

Q. Do you know how old it was?

A. In the neighborhood of 6 or 7 months old, I think.

Q. You had used it for mooring the ship?

A. For seven months, yes.

Q. How often had you used that particular line, do you suppose?

(Deposition of Henry McDonald.)

A. Well, we had used it several voyages while in port.

Q. Did you consider that line was sufficiently good to use for towing you out in the stream? [31]

A. Yes, I did.

Q. What happened after this?

A. We dropped the ship over on Pier 44.

Q. Yes?

A. And gave him another line, or the other end of a seven-inch line.

Q. Gave the "Fearless"? A. Yes.

Q. Was that the same line that parted?

A. The same line that parted.

Q. And then what happened?

A. Then we started the ship out again from the dock.

Q. Started out into the stream? A. Yes.

Q. Where were you standing?

A. I was on the bridge.

Q. Where was the first officer?

A. On the forecastle-head.

Q. And the second officer was where?

A. Aft, under the poop.

Q. You had steam up on your main engine?

A. Yes.

Q. When you started out from the slip how much line was there out between the stern of your ship and the tug?

A. On the second time when we started to pull her out?

Q. Yes. A. I should judge 20 or 30 fathoms.

(Deposition of Henry McDonald.)

Q. Did you give any signal to the tug that you were ready to move out this second time?

A. Yes, we told him we were ready.

Q. And what happened then?

A. We started the engines slowly astern with the boat pulling and immediately stopped [32] them again.

Q. You stopped what, your engines? A. Yes.

Q. And you passed out along the side of Pier 44?

A. Yes.

Q. Out into the stream? A. Yes.

Q. With the tugboat hauling astern?

A. With the tugboat hauling astern.

Q. And then what happened?

A. Then the ship was going a little bit too fast on leaving the dock and went more slowly for a few seconds.

Q. Where was your bow when you put your engines ahead slow at that time?

A. The first time she was hardly clear of the dock.

Q. Do you mean that the bow was inside the harbor end of the pier?

A. Yes. That is the first time.

Q. What was the effect of the engine going slow ahead?

A. Just to stop her a little from going to fast alongside of the dock.

Q. What did you mean to do, to slow her down?

A. Yes, go a little slower.

Q. Did it stop her headway altogether?

A. Oh, no, just slowed her a little.

(Deposition of Henry McDonald.)

Q. Why did you want to slow down?

A. On account of the tide pressing her against the dock, we were destroying the dock somewhat.

Q. Some projections on the side of the ship were scraping [33] along the dock?

A. Yes, sir, scraping along the dock.

Q. How long did you keep your engines slow ahead at that time?

A. I should say three or four seconds.

Q. Was it what you could characterize as just getting her under way? A. That is all.

Q. Then what happened?

A. Then he kept on towing her until I should judge she was 30 or 40 feet outside of the dock.

Q. Your bow was 30 or 40 feet beyond the end of the dock? A. Yes. sir.

Q. How was the weather at this time?

A. Strong southeast wind blowing.

Q. That was blowing from which side?

A. Blowing from the port side toward the starboard.

Q. And how was the tide?

A. Strong ebb tide.

Q. Was that setting with the wind or against the wind? A. With the wind.

Q. In the same direction?

A. In the same direction.

Q. So that the wind and tide would both tend to set you down along the piers to your starboard side?

A. Yes.

Q. What happened when your bow was about 30

(Deposition of Henry McDonald.)

or 40 feet off the end of the pier?

A. I started slow ahead again, slow ahead, thinking the towboat was going to turn the ship around by the stern.

Q. What procedure did you expect the tow to follow in [34] towing you out?

A. I expected that he would turn to port, keep turning our stern.

Q. That is turn to his port? A. Yes.

Q. And tow your stern around which way, to the westward? A. To the westward.

Q. And what was the idea of that?

A. So as to keep the ship turned round and go ahead for our dock.

Q. So that your bow would be pointed—

A. In the direction of the dock.

Q. That is in the direction of the drydock?

A. The drydock at Hunters Point.

Q. When you started slow ahead on your engines what happened?

A. Shortly afterward the mate sang out and said the line was cast off the boat, and before the engine stopped it was in the wheel.

Q. That is, it fouled the propeller?

A. Fouled the propeller.

Q. Did you give any signal to the tugboat to cast off her line? A. No, I did not.

(By Mr. McGRANN.)

Q. May I understand that answer,—you say the mate said this? A. The second.

Q. Is that what the mate said or is that the state-

(Deposition of Henry McDonald.)

ment of the captain, is the last part what the mate said or is that what you said? [35]

A. That is what I got about it from him.

(By Mr. FARWELL.)

Q. What report did the mate make to you?

A. That the line was in the wheel.

Mr. McGRANN.—I object to that.

Q. Did the mate report that the line had been cast off? A. Yes.

Q. After you got in the drydock did you see any of this seven-inch hawser afoul of the propeller?

A. Yes, there was a couple of turns of it around the propeller when we got in.

Q. Did the tugboat, so far as you know, make any report when she cast off the hawser?

A. Not to my knowledge, she made no report.

Q. Was any report made to you about casting off the hawser except by the second mate? A. No.

Q. At that time your engines were going ahead?

A. Had been going ahead, they were stopped when the line got into the wheel.

Q. At the time your propeller became foul did the "Edith" have any motion through the water, either headway or sternway?

Mr. McGRANN.—I object to the form of the question, in that I contend that the line was not afoul of the propeller. It is a conclusion [36] of counsel.

(Question withdrawn.)

Q. At the time you stopped your engine did the "Edith" have any motion through the water?

A. She had a little, very little, tending ahead.

(Deposition of Henry McDonald.)

Q. How far was the bow of the "Edith" distant from the end of the piers then?

A. Somewhere about 30 feet I should judge.

Q. Of the pier ends? A. Yes.

Q. Had you drifted down along the piers?

A. Yes.

Q. Opposite what pier were you when you stopped your engines? A. Off Pier 42 I believe.

Q. Why did you stop your engines?

A. Because of the report from the officer that the line was in the wheel, or had been let go from the tug.

Q. What happened after that?

A. The tugboat went around the ship to try and secure another line from the bow.

Q. How soon after you got the report that the line had been cast off was it before the tugboat got around to your bow?

A. It must have been in the neighborhood of five minutes.

Q. Which side of you did she pass on?

A. Starboard side.

Q. Did she hail you as she passed you?

A. No. [37]

Q. You were drifting to the westward?

A. Drifting to the westward.

Q. What happened after that, after the tugboat got under your bow?

A. He got a line from the mate and ran it out apparently putting a considerable strain on it and it parted.

(Deposition of Henry McDonald.)

Q. Did the tug bring a strain gradually to bear on the line?

A. Well, I could not really say that, at the time I was looking how far we were from the dock, and it was reported the line had carried away.

Q. That is this last hawser, the third hawser?

A. The last hawser, the third hawser.

Q. Had you expected that the tugboat was going to take a line from your bow?

A. Yes, I expected he would after he had thrown the other line off.

Q. But when you started to come out from the slip had you expected that the tug would take a line from your bow? A. No, I didn't think that.

Q. When this last hawser parted how far were you from Pier 32?

A. We were probably 150 or 200 feet.

Q. Describe Pier 32 with reference to the other piers as to length?

A. It stands out much further than the rest of the piers.

Q. About how much further in feet?

A. Probably 200.

Q. At the time that the third hawser parted how was [38] your stern with reference to the end of Pier 32, was it inside of it or outside of it, with reference to a line tending to cross the end of Pier 32?

A. It would be pretty nearly square with it.

Q. So that the entire ship would be inside the end of Pier 32?

(Deposition of Henry McDonald.)

A. Inside the dock, yes, inside of Pier 32.

Q. What size was that third line?

A. The third line was a six-inch line.

Q. In what condition was that?

A. Fairly good condition.

Q. How soon after the tug started to tow did the third hawser part?

A. Probably two or three minutes.

Q. Did the tug succeed in hauling the bow around?

A. Very little.

Q. How did you know that the third hawser parted, did you see it part?

A. No, I didn't see it part.

Q. Was any report made to you?

A. A report from the mate that the line was parted.

Q. At the time you got the report that the third hawser had parted what did you do?

A. At the time it was reported that the third hawser had parted or was let go from the ship—there was some doubt whether it parted or whether it was cast off from the tug.

Q. You don't know whether it parted or whether it was cast off?

A. No, I could not say whether it parted [39] or was cast off.

Q. But you knew—

A. Knew it had been cast off, at least it was not fast to the tug.

Q. There was no line between you and the tug?

A. No.

(Deposition of Henry McDonald.)

Q. What did you do when you got that report?

A. I went full speed astern, fragments of the seven-inch line was fast to the wheel.

Q. What happened then?

A. The ship went astern but not sufficient to clear the dock, Pier 32.

Q. And you came into collision?

A. With the end of the dock.

Q. What part of the dock hit her?

A. The corner of the dock.

Q. Whereabouts did it hit on the "Edith"?

A. Probably about one-third from the bow.

Q. One-third the length aft? A. Yes.

Q. Would it have been possible for you to anchor when this third line was cast off or parted?

A. No, not without damaging the ship.

Q. Why not? A. Too close to the pier.

Q. If you had let go an anchor what would have been the result?

A. Well, she would have swung around on the dock and very probably broken off her rudder or wheel or done some damage, which I was trying to avoid.

Q. How much water is there there?

A. There is plenty [40] of water, probably—I am not sure, probably 8 or 9 fathoms of water.

Q. How much chain would you have had to have out in order to hold her against that wind and that tide?

A. I would have had to have at least put out about

(Deposition of Henry McDonald.)

30 fathoms to have checked her with the wind and tide.

Q. And if you had veered out 30 fathoms where would that have brought your stern with relation to Pier 32?

A. As near as I could judge it would have brought us on somewhere about the stern, but I could not exactly say where.

Q. Would it have let your stern go onto Pier 32?

A. Yes, sir.

Mr. McGRANN.—Objected to as entirely speculative, calling for a conclusion and not based on the facts.

Q. You say you didn't know how much water there is there? A. No, not exactly.

Q. Are you familiar with the tidal conditions in San Francisco Harbor?

A. Not very familiar with them.

Q. What was the result of the collision with the pier generally?

A. It damaged the ship considerably on the starboard side.

Q. What happened after the collision?

A. Immediately we steamed toward the drydock. [41]

Q. And did you anchor when you came up to the drydock?

A. No, the tugboat assisted us when we got up there with another line and we succeeded in docking.

Q. Who supplied this fourth line?

A. The towboat.

(Deposition of Henry McDonald.)

Q. What size was it?

A. I could not say the size of it.

Q. Approximately? A. Probably eight inches.

Q. Could you say whether it was as large as a twelve-inch hawser?

Mr. McGRANN.—Objected to, he has already said what it was.

Mr. FARWELL.—He said probably.

A. (Continued.) It might have been, I really could not say, it was getting dark.

Q. Referring to the parting of the second hawser while you were still in the slip what can you say as to the cause of that parting?

A. The extra strain that he put on to it in the jarring and jerking of the boat by going ahead swiftly before the line was tight.

Q. Do you mean he brought a sudden jerk on the line? A. Brought a sudden jerk on the line.

Q. And you think that caused it to part?

A. That caused it to part.

Q. Do you know of any reason why the tugboat could not have used the line which was subsequently used in docking you at the drydock, when the tugboat came [42] around your bow after casting off the second hawser?

A. I see no reason why she could not have used it.

Q. Would it have been possible for the tugboat to have put her bow against your starboard bow and shoved you around? A. Certainly.

Q. Is this latter method the customary way of turning ships?

(Deposition of Henry McDonald.)

Mr. McGRANN.—I object to these questions as very leading.

A. Yes.

Q. Do you know how much your repairs cost?

A. In the neighborhood of $14,000 I think.

Q. Did you see the repair bills? A. No.

Q. In the answer it is alleged in the last three lines of page 8 and the beginning of page 9 "that the steamship had been backed out of the slip and into the bay approximately 700 feet when the hawser had been cast off"; is that a correct statement?

A. No, I consider not.

Q. Did any part of your ship ever get 700 feet out into the stream? A. No, I don't think so.

Q. How far did you say your bow was when the second hawser was cast off?

A. About 30 or 40 feet from the end of the dock.

Q. Was there any delay in passing out the third line—that is the one that was passed out from your bow after the [43] tugboat reached your bow so that she could take a line? A. No delay.

Q. At page 9 of the answer, line 30, and page 10, lines 1 and 2, it is alleged that the master of the tug suggested that you back your engines; that was subsequent to the parting of the third hawser; did the master of the tugboat make any such suggestion that you heard? A. Not to my knowledge.

Q. That is, you didn't hear it? A. No.

Q. What did the tugboat do after the third hawser had parted?

A. He steamed up ahead of us to Hunters Point,

(Deposition of Henry McDonald.)

he didn't do anything in connection with the ship in getting there after that.

Q. I don't think you got the question; after the third hawser parted—between that time and the time when the collision occurred, what did the tugboat do?

A. She just simply laid where she was, didn't do anything.

Q. Did he make any effort to assist you?

A. Made no efforts to assist me.

Q. Did he attempt to pass you a line from his boat? A. No, sir.

Q. You have been towed out stern first from piers in other harbors besides San Francisco Harbor, have you not? A. Yes, very often.

Q. What ports, mention a few?

A. New York or any [44] of the ports where I have been trading around the United States and the Atlantic Coast, such as Boston, Philadelphia, Baltimore, all these ports they invariably turn the ship around with a stern line when towing out in that direction.

Q. In those cases did you give any signal to the tug to cease towing or to cast off his line?

A. To cease towing, yes, and to cast off the line.

Q. Is it customary for the ship to assist in turning by the use of her own engine? A. Yes.

Q. How does she generally do that?

A. By going ahead either starboarding or porting her wheel as the case might require.

(Deposition of Henry McDonald.)

Q. And the tugboat, during this maneuver, does what?

A. Does the pulling around and down to put the ship's head in the same direction.

Q. Which way is the tug pulling?

A. Well, for instance if you wish to pull the ship's head to starboard, the tug must pull her stern to port.

Q. In this case when the "Fearless" was taking you out?

A. We wished our head to go to port, consequently we wished the tow to pull the stern in the opposite direction.

Q. How far did you expect the "Fearless" to tow you out in the stream before you were going to give her the signal to stop towing?

A. We would have been about 50 feet **[45]** or 60 feet from the dock when we got turned round, if he had kept towing.

Q. That is you mean substantially pivoted right in that position? A. Yes.

Cross-examination by Mr. McGRANN.

Q. Where is your bridge on the "Edith," how is it located?

A. It is about one-third of the ship I should judge, from the bow.

Q. How long is the "Edith"?

A. About 328 feet.

Q. As you stood you were a little over 200 feet from the stern?

A. In the neighborhood of about 200 feet.

(Deposition of Henry McDonald.)

Q. What kind of a vessel is the "Edith," how is she constructed, on what system?

A. She is the Isherwood system.

Q. Flush deck?

A. No, what they call a three island deck.

Q. Her bridge, I suppose, is elevated above the middle structure? A. Yes.

Q. How high is the bridge from the water line?

A. It is about probably 30 feet.

Q. Were you on the bridge all the time throughout this maneuver? A. All the time.

Q. Who else was with you there?

A. The third mate and the quartermaster. **[46]**

Q. Did you have your steam steering-gear in operation?

A. Yes, the steam steering-gear.

Q. Who was operating the engines, I mean giving signals, you personally?

A. The third mate, with my orders.

Q. Did you keep any record of your engine movements on that occasion? A. We did not, no, sir.

Q. Didn't you keep them in the log-book?

A. We do generally.

Q. Did you keep any memorandum whatever of the movements and what times the various signals were made?

A. No, we didn't on that occasion.

Q. Who does that ordinarily?

A. The third mate.

Q. How about in the engine-room, don't they keep a record in the engine-room?

(Deposition of Henry McDonald.)

A. They keep a record in the engine-room.

Q. Do you know whether they kept any on this occasion? A. I think so.

Q. Where is the "Edith" now?

A. At Porto Rico.

Q. Do you trade between Porto Rico and the east coast? A. And New York, yes, at present.

Q. When is she due here again, do you know?

A. In about two weeks.

Q. Is the chief engineer still on board the "Edith"? A. No, he is not there.

Q. Are any of the officers, to your knowledge, on the [47] "Edith" that were on her then?

A. Not any, to my knowledge. Yes—I think the first assistant.

Q. The log-books remained on the vessel, didn't they? A. I imagine they did.

Mr. McGRANN.—I call for the production of the log-books bearing on this occurrence.

Q. At any rate you had an unobstructed view of everything about the ship from where you were, did you not? A. Yes, on the ship I had.

Q. How much water were you drawing on this occasion?

A. We were drawing I think about ten feet.

Q. Beam?

A. No, probably about eight feet beam.

Q. Down by the stern? A. Down by the stern.

Q. You say eight feet *mean?*

A. I think in the neighborhood of that, yes.

Q. What would your draft astern be?

(Deposition of Henry McDonald.)

A. Probably about ten feet.

Q. You were light then? A. Yes.

Q. Did you have any ballast on?

A. We had some little ballast. That is approximately, you know.

Q. I am asking you for your best judgment?

A. Yes.

Q. What sort of engines has the "Edith"?

A. We have triple expansion engines.

Q. What speed does she make ordinarily, full speed? A. She is about a 10 knot boat. **[48]**

Q. Single propeller? A. Single wheel.

Q. What sort of anchors had you?

A. We had patent anchors.

Q. Those anchors were ready for letting go, were they not? A. All ready.

Q. What weight were they?

A. They were about two tons or 2½.

Q. Pretty heavy anchors for that tonnage, weren't they? A. Well, they are Lloyds regulation.

Q. What is your tonnage, by the way, of the "Edith"?

A. The tonnage is 27 something.

Q. 2700? A. Yes.

Q. Net or gross? A. Net.

Q. When did you leave the "Edith"?

A. I left the "Edith" in June 1916.

Q. Who owns this vessel that you are on now, the "Helen"?

A. The Bull Insular Line, A. H. Bull & Company, agents.

(Deposition of Henry McDonald.)

Q. You yourself made the engagement for this tug, did you, over the telephone? A. Yes.

Q. It was not intended that the tug should do anything but assist you into the dock?

A. That was my intention.

Q. You did not intend that she should haul you out of the slip at all, did you? A. No.

Q. You did not think you required the tugboat to haul you out of the slip, did you? A. I did not.

[49]

Q. You frequently back out of that slip there in San Francisco and turn and go on wherever you want to go? A. Very frequently.

Q. Why was it that you didn't do it on this occasion?

A. It was getting late in the afternoon—getting late in the evening, and I thought we would do it much quicker and get into drydock before dark.

Q. And when the tugboat came I presume you told him that in addition to putting you into the dock at Hunters Point you would like to have him haul you out of the slip?

A. No, I didn't mention anything to him at all.

Q. You did not? A. No.

Q. Then that was a voluntary service on his part, was it, hauling you out?

A. I imagine he came so as to have an extra charge, or he may have understood that we meant to have him there.

Q. Didn't you tell him anything about hauling you out of the slip; how did he get your line?

(Deposition of Henry McDonald.)

A. He sent a man off and we gave him a line, but I didn't speak to the captain, didn't see the captain, told the second mate to give him the line, send the line over.

Q. You saw the mate give him the line, did you?

A. Yes.

Q. You saw the tug go out? A. Yes.

Q. Pointed out of the slip? A. Yes.

Q. You were in a position to see what the tug was [50] doing, were you?

A. I saw them for awhile until he got out of position. Of course when he got right astern of my ship I could not see him very well with a short tow-line.

Q. You could see him if you looked, could you not? A. No.

Q. Why? A. I mean I could not see him.

Q. Why couldn't you?

A. Because the ship was too high and he had a short line, not over 30 or 40 fathoms of line. Well, I may have seen his stack or part of his bow; I could not see all his boat, I remember that very distinctly.

Q. How high would you say the stern was, the poop-deck, from the water-line?

A. It would be somewhere in the neighborhood of 20 feet.

Q. Could you see the second officer? A. Yes, because he may have come from one side to the other so I could see him.

Q. If the tug had gotten out of position and gotten even on your starboard quarter what prevented you from seeing the tug in that position?

(Deposition of Henry McDonald.)

A. I seen her.

Q. Then when the tug did get out of position, if it did get out, as you say, there was nothing to prevent you seeing her in that position, was there?

A. Nothing at all. **[51]**

Q. Before I go any further, tell me what time it was that the tug arrived there, if you know?

A. As far as I know about 3:30.

Q. As a matter of fact, did you see the tug when she was then in that position on your starboard quarter from where you were in the slip?

A. While she was out of position you mean?

Q. Yes? A. Yes.

Q. You say at that time you had your stern lines hauled in?

A. No, not at all, but they had slacked them up, I understand.

Q. Did you see the line part?

A. Yes—well, yes, I might say so because as the boat ran ahead of course I could not see the line where it did part, under the stern, as it were, but as they went by the mate sang out that the line had parted, but at that time they were taking in the lines, unmooring from the dock, and the stern began to stand over.

Q. Could you not tell from what you saw of the tug's movements that the line must have parted?

A. No, because the tug stopped as soon as it parted, it was astern, I could not really see then whether it had parted or not.

Q. You had your bow-line out when it was reported

(Deposition of Henry McDonald.)

to you that the line had parted? A. Yes. [52]

Q. And some of your stern lines, I take it?

A. Yes.

Q. So that your moving over toward the other side of the ship, that is, from the southern side of Pier 46, was a matter which you did yourself?

A. Yes.

Q. That was not caused by the tug's parting the line, was it?

A. Well, in reality it was, because we didn't expect to part the line, and the second mate began to take in his line which let the ship practically loose from the dock aft.

Q. You could have held on if you had wanted to, could you not?

A. Well, probably I could but it seemed a good idea to drop her over to the other dock.

Q. You did not damage the ship by dropping over?

A. No.

Q. No damage done at all? A. No.

Q. So that as a matter of fact the first parting had nothing to do with subsequent events, isn't that true? A. Well, in that respect.

Q. When did you get this line that parted, or the first line that you are talking about?

A. They came out with the ship, new.

Q. You had had it on board ever since?

A. Four times.

Q. You had had it on board ever since?

A. Had it on board ever since.

Q. Do you know where that line was bought?

(Deposition of Henry McDonald.)

A. No, sir. [53] I could not tell you.

Q. Somewhere out there on the west coast?

A. No, it was either bought in New York—New York, probably, or Baltimore.

Q. She was fitted out at New York?

A. Fitted out at Baltimore.

Q. At any rate you had been using that line right along for mooring purposes?

A. Yes, when we needed it.

Q. How long do you think a hawser lasts, what has been your experience?

A. How long a line would last?

Q. Yes?

A. Of course that depends altogether on the usage it gets. You might wear a line out in two months so it would not be fit for anything or it might last you a year and be a very good line.

Q. Is it not said that the life of a manila hawser is usually six months?

A. I have not heard it; it depends entirely on the usage of the line.

Q. How long was this hawser, do you know?

A. I think about 90 fathoms.

Q. Can you tell me where it parted on this first occasion, from either end?

A. I think they had out about 20 or 30 fathoms, as far as I know, at first.

Q. You mean it parted at the ship or at the tug?

A. No, it parted, I think, between the ship and the tug, if I understand right. [54]

Q. At any rate you hauled the end aboard and had

(Deposition of Henry McDonald.)

it there? A. Yes, sir.

Q. I understand that the same line, the same end, was passed out again?

A. No, I don't think the same end, not the same end.

Q. Do you know whether or not it was the same line? A. The same line, I understand.

Q. But you don't know that?

A. Well, that is what I go by, what I am told.

Q. But you don't know it yourself that the line was passed for the second line?

A. Yes, the second line was a seven-inch line.

Q. Was it the same line that had parted?

A. Yes, sir, the same line, and I had better say the same line because I am told it was the same line, of course I was not aft then.

Q. And you don't know? A. No.

Q. I am trying to get at the facts, it does not make any difference whether you say so or don't; I want to know the fact? A. That is the fact.

Q. You seem to be not quite sure of it?

A. The last line was a 7-inch line.

Q. How much did the tug have out of that line, the second line?

A. I should judge in the neighborhood of 30 fathoms, along there. [55]

Q. Who gave the signal to the tug that time to go ahead?

A. That time, you know, she was on Pier 44 and I told him to go ahead, waved my hand to the third officer and told the towboat to go ahead.

(Deposition of Henry McDonald.)

Q. You simply waved your hand? A. Well—

Q. Did you see them reply from the tug to that waving of yours?

A. No, I could not see the tug then, she was way astern of me, I could not see the captain, I could see the stack.

Q. Why didn't you have some signal system or whistle system?

A. Well, I would have to find out if the captain knew what I was whistling about.

Q. At any rate you didn't arrange any signals?

A. No.

Q. You depended on passing word by the second officer? A. By the second officer.

Q. What was the second officer's name?

A. Hansen.

Q. What was the third officer's name?

A. Turnquist.

Q. What was the chief officer's name?

A. Cummings.

Q. Then you got started out on this second occasion after you had given the signal, and I understand you gave the order slow astern on your engines? A. Yes.

Q. That order was obeyed, was it?

A. Obeyed.

Q. And you came on out of the slip? A. Yes.

Q. Do you know what the force of the tide was that [56] afternoon?

A. I should judge about two or three knots.

Q. Setting to the northward, you say?

(Deposition of Henry McDonald.)

A. Setting to the northwest, yes.

Q. And what was the force and direction of the wind?

A. The wind was southeast, I should judge, about force 8.

Q. Beaufort scale? A. Yes.

Q. You knew the weather conditions before you started out, did you not? A. Pretty well.

Q. Perfectly well? A. Yes.

Q. How far out did you intend that the tug should haul you, did you say?

A. Well, I didn't have any special distance but I supposed he would turn me around when I was 50 or 60 feet from the dock.

Q. That is when your *stem* was 50 or 60 feet out from the end of the dock?

A. Yes, he would start to swing me.

Q. And you say that you had anticipated that he would swing your stern to his port, and to your own starboard?

A. No, swing my bow to port and swing the stern around to starboard.

Q. He was made fast to your stern? A. Yes.

Q. And you anticipated that he would swing your stern to your starboard, did you not?

A. Yes.

Q. Why did you take it for granted that the captain of the tug would do this without any orders from you? [57]

A. Why, it was a very natural thing for him to do.

(Deposition of Henry McDonald.)

Q. You say it was a natural thing for him to do, but you did not give him any orders to do this, did you?

A. Well, he knew where the ship was going, he didn't suppose he was going to turn my ship way round the other way, way round, when he could by just turning her half the distance.

Q. Tell me one thing; did you give the captain of the "Fearless" orders to turn your stern over to your starboard side? A. No.

Q. You did not? A. No.

Q. To get the engine movements a little more clearly in mind and on the record, just as nearly as you can state give us the position of the "Edith" when you first stopped the engines while you were moving out of the slip?

A. I stopped the engines at first when she was a little more than half out of the slip.

Q. Does that mean that half of the ship was clear of the slip? A. Yes.

Q. How long did you keep the engine stopped then?

A. Then before she cleared the dock I went ahead for a few seconds.

Q. And did you stop again?

A. Then I stopped again.

Q. On the second stop tell me what position the "Edith" was in?

A. Her bow was just pretty nearly square with the dock. [58]

Q. On a line with the end of the dock?

(Deposition of Henry McDonald.)

A. On a line with the end of the dock.

Q. And what was the next thing you did with the engines of the "Edith"?

A. Then when she got clear of the dock about I should judge 30 to 40 feet I went slow ahead with my wheel hard astarboard.

Q. Hard astarboard? A. Hard astarboard.

Q. That would tend to throw your bow to port, would it? A. Yes, sir.

Q. Did you keep your engines going ahead?

A. No, after staring that time I looked astern and the mate put up his hands to stop.

Q. To you?

A. Yes, but he had thrown the line off the towboat.

Q. Who had thrown the line off the towboat?

A. The towboat captain.

Q. Did you see that?

A. No, I could not see it.

Q. How did you know that he had done that?

A. They told me.

Q. By voice? A. Yes.

Q. How long do you think it was from the time that you started ahead and put your helm to starboard up to the time that you saw the mate signal this way (indicating) that the hawser had been thrown off?

A. I should judge— [59] well, probably five or six seconds.

Q. Are you quite sure that you did not stop the engines before you saw the mate's signal?

(Deposition of Henry McDonald.)

A. No, I didn't stop the engines, I had just started them.

Q. You had just started them and you didn't stop them until after the mate signaled?

A. After the mate signaled that the line was gone.

Q. Did you say that the mate had hauled in the line?

A. Not then, when the engines were stopped, but before we took time to stop them the mate was hauling the line in, and it was afoul of the wheel.

Q. Now, did you go aft to see what the conditions were at that time? A. No, I didn't.

Q. Why do you say that the line fouled the wheel, you didn't see it, did you? A. Yes.

Q. How did you see it?

A. I got the end off after when we went into drydock.

Q. But I am talking about the time, at the time and the position you were then in, how could you see the line had fouled the wheel?

A. I sent the third mate aft to see if it was foul of the wheel.

Q. And you yourself didn't see this? A. No.

Q. Then you don't know from your own personal observation?

A. I do know now, yes, of course I know.

Q. You may have seen the hawser afoul of the wheel [60] after you got to Hunters Point, but what I want to know is did you know then, of your own knowledge, of this occurrence? Did you at this time see the wheel afoul?

(Deposition of Henry McDonald.)

A. I don't know but what I went aft myself, really I think I did go aft, I don't like to say without being sure of it but I really think now I did go aft.

Q. I don't want to put you in any way in a false position, I want the facts exactly as you saw them?

A. I swear I think I did—no, I could not say that I did.

Q. As it stands, you were saying that the line fouled the wheel because some one else told you so, that was the situation at that time? A. Yes, sure.

Q. Did you give the tug any orders after that stage of the maneuver? A. No.

Q. Just tell me again where the ship was when this occurred, this signal from the officer aft?

A. I explained that I was about 30 or 40 feet from the dock.

Q. Which dock?

A. No. 40 I guess, we were down at 42 then, I think.

Q. Right abreast of No. 40?

A. Somewhere right abreast of No. 40.

Q. How were you heading with reference to the slip?

A. The same as when we pulled out of the dock.

Q. Had not turned either one way or the other?

A. Turned a little but not a great deal. **[61]**

Q. Which way did it turn, if it turned?

A. A little to starboard,—a little to port, her bow, on the starboard wheel.

Q. You mean that the bow of the "Edith" had turned slightly to port?

(Deposition of Henry McDonald.)

A. Slightly to port, that is right.

Q. In that situation, didn't it occur to you that you ought to do something? A. Yes, it did.

Q. What did you do?

A. Well, then the towboat was coming around and I knew he could get a line out, which he did, and the consequence was he carried it away.

Q. How was your helm all this time while the ship was coming around,—heading, rather?

A. The helm was hard astarboard.

Q. Wasn't the ship moving under the influence of the wind and tide?

A. Yes, going with the wind and tide.

Q. Was she closing in on the piers?

A. Closing in on the piers a little.

Q. You had the full force of the tide and wind, I suppose, on your port side at that time?

A. Port side.

Q. Didn't it occur to you to drop an anchor?

A. I could have done so, but I knew I was going to do some damage to the ship and I thought if we could get a line out we would not do any damage, did not want to do a minor damage when we expected to get away without any. [62]

Q. You could have dropped an anchor there as far as the custom of dropping an anchor is concerned; you could have dropped an anchor or you could have dropped two of them?

A. No reason why we couldn't.

Q. That would have been the proper thing to do?

A. I don't think so.

(Deposition of Henry McDonald.)

Q. There was no reason why you could not have dropped both of them as far as the anchors were concerned?

A. No reason why I could not have dropped them.

Q. That would have retarded your motion at any rate, would it not?

A. It would have swung the ship, it would not have retarded on the general movement.

Q. Don't you think it would have retarded the ship if you had had two anchors down under the forefoot?

A. It would have stopped her if you had got room.

Q. Aside from the room proposition would not two anchors underneath the forefoot have stopped the ship?

A. That seems to be a very material question because—

Q. What is your judgment about it?

A. When we anchor in the stream the anchor is supposed to hold the ship—

Q. What I want to know is, aside from what you have in mind about the swinging of the ship, would not the dropping of both anchors under the forefoot have brought her up in some position?

A. Yes, it would have turned her around. [63]

Q. Now then, if she had swung you think she would have swung onto the pier do you?

A. Onto the pier, yes, I do.

Q. Would she not have taken the course of the tide?

(Deposition of Henry McDonald.)

A. She would, probably, after she got clear of the pier.

Q. Do you know how the line of the piers is opposite Pier 32?

A. I am not very familiar with that, no.

Q. Do you know what the direction of the tide was exactly along there?

A. Running down across the piers.

Q. About parallel with the outer end of the pier?

A. I should judge so, yes.

Q. Then is it not true that you would have brought up in a position parallel to the ends of the piers?

A. Yes, if you had room to swing, you would have to have considerable chain.

Q. Assuming that you were 30 to 40 feet out from the end of the piers and you have said that your ship would have stopped with two anchors down, and that she would have swung on the tide, and that the tide was parallel to the ends of the piers, don't you see that you would have had clearance off the pier then?

A. No, you are not giving us any allowance for the chain, the chain I would have to give the ship to pick her up.

Q. I said in my first question if you dropped both anchors right under the forefoot; you don't have to have [64] any chain practically, just enough to reach the bottom?

A. That would not have helped.

Q. You cannot say it would not have helped; why would it not have helped?

(Deposition of Henry McDonald.)

A. It would not have helped unless you gave her sufficient chain.

Q. You will concede, won't you, that it would have retarded the movement of the ship somewhat?

A. No, I would not, unless you gave her sufficient chain.

Q. You don't think two heavy anchors dragging along the bottom would prevent the ship from moving as quickly as if the anchors were not there?

A. I admit that.

Q. If you had done that? A. Yes.

Q. Well, we have got that far; you will concede that won't you? A. Of course, anyone would.

Q. Now as to this line that you gave the towboat "Fearless" from your starboard bow, I believe it did come from the starboard bow, didn't it?

A. Yes.

Q. And when did you get that line?

A. That was the same age as the other line.

Q. That you said was only in fair condition?

A. That was in fair condition.

Q. You stated the other line was in good condition, the first one? A. Yes.

Q. So that you mean to imply, I take it, that the second line was not in as good condition as the first one? [65] A. Not quite.

Q. What size was it? A. Six-inch line.

Q. It was smaller than the first one?

A. A little smaller than the first one.

Q. Did you give the tug any instructions then, when you got out this bow-line and gave it to the tug,

(Deposition of Henry McDonald.)

did you give the tug any instructions?

A. Nothing more than with my hands to keep up that way (indicating the port bow).

Q. What did you say caused the parting of that line, or did you say?

A. No, I don't know what caused it.

Q. How long after the tug took that third line, as we have called it, did it part?

A. I should judge about three minutes, along there, I think about that time.

Q. I understood you on direct examination to say that when the third line parted you were probably 150 to 200 feet from Pier 32, is that right?

A. Yes.

Q. In what direction do you mean from Pier 32, how would you lay that off, that 150 or 200 feet from the pier.

A. In an easterly direction, Pier 32 runs out, a much longer dock than the others.

Q. How did it bear from you as you lay there?

A. In a northwest direction off the starboard side of the ship.

Q. Off the starboard beam?

A. Off the starboard beam.

Q. How would you say you were heading at that time? [66]

A. Still in a southerly direction.

Q. I wish you would put down on this paper just the location of these things, put Pier 32 down there and your ship.

Witness does as requested. Witness indicates the

(Deposition of Henry McDonald.)

position of the "Edith" with respect to Pier 32 when the line parted, known as the third line, which was the bow-line. He also indicates the position of the tug, which is marked "tug" and also the respective position of Pier 34, which is marked 34.

The sketch is offered in evidence.

Mr. FARWELL.—Objected to unless the captain is given an opportunity of correcting it in accordance with his testimony.

It is marked Claimant's Exhibit "A."

Q. I understand that in this position you were about 150 feet, the "Edith" was about 150 to 200 feet from Pier 32, is that correct? A. I think so.

Q. Was it in that position you started your engines astern (referring to Claimant's Exhibit "A")?

A. Yes.

Q. You didn't have any difficulty in operating the engines, did you? A. Not after we started, no.

Q. Was that the first effort that you had made from the time that the line was cast off, as you say, up to the time that the bow-line parted?

A. Yes. [67]

Q. Why was it that you did not make an effort to start your engines before?

A. I was rather afraid when the seven-inch line fouled the wheel, thinking the towboat would have it performed or we would get out without that.

Q. Didn't you think that there was a position of danger there? A. I could readily see it.

Q. When did you first see that?

A. The danger of the line being around the wheel?

(Deposition of Henry McDonald.)

Q. No, I mean did you think there was a position of danger from your drifting down, as you have described? A. Yes, I did.

Q. You knew that eventually you must bring up against something, did you not?

A. I surely did.

Q. How was it, I want to know why it was that you did not start your engines before you did?

A. Because I didn't want to, I was afraid to attempt that, I was depending on the towboat.

Q. Had you had any communication with the engine-room from the time that the second line was cast off up to the time that the third line was cast from your bow to the tug? A. No.

Q. Had not sent any word down to the engineers about this? A. No.

Q. And yet in that time you had drifted down from off Pier 42 to this position between Pier 34 and Pier 32, is [68] that true? A. Yes.

Q. Do you know how long that distance is?

A. No.

Q. Didn't you think that the situation there demanded that you take some risk to save your vessel from collision with the pier?

A. I was expecting the towboat to do something, depending on the towboat.

Q. You were relying on the towboat?

A. Depending on the towboat.

Q. You did not anticipate that this towboat could handle your steamer in that wind and tide without some assistance from the steamer, did you?

(Deposition of Henry McDonald.)

A. No, but it could easily swing us around, though.

Q. Then you wish to modify your answer to the extent that she could easily have swung you around?

A. I don't know, you didn't ask me that question.

Q. What I asked you was this: did you think that this tug could handle your steamer in that wind and that tide without any assistance from the steamer?

A. No, except to swing her around as I expected him to do, I wanted him to swing her around.

Q. You said that Pier 34 was about 200 feet inside of Pier 32, did you not?

A. I thought that, I don't know whether it is so or not.

Q. I have a little diagram here which is supposed to be a view of the San Francisco water front in that vicinity [69] there, from 24th Street to Laguna Street, marked 1916; on that diagram it indicates that Pier 32 projects out beyond Pier 34, is that your memory of it? A. Pier 36?

Q. Just take a look at this.

A. It might be, I could not say so.

Q. I just show you this to refresh your memory, let me know if that is correct.

A. Very likely it is correct, I could not say.

Q. Do you know of your own knowledge whether or not Pier 36 does project out beyond Pier 34?

A. No, I do not.

Q. Pier 34 is about on a line or approximately so with Pier 44, is it not? A. As far as I know, yes.

Q. The end of it I mean? A. The end of it.

Q. I would like to know what you base your state-

(Deposition of Henry McDonald.)

ment on that you never got out any further than 30 to 40 feet outside of Pier 44?

A. Only my idea of what I think, best of my opinion.

Q. What is the beam of your ship? A. 41 feet.

Q. Do you mean to say that you did not get out any further than the beam of your ship away from the end of the dock?

A. You mean the width of the ship?

Q. Yes, the width of the ship?

A. I don't think we got out any further than that.

Q. You don't appear to be very sure of that point?

A. Of course I am. **[70]**

Mr. FARWELL.—I object to counsel's statement.

A. What I am giving you is the best of my knowledge and opinion.

Q. Is it not true that you are not very sure of that distance? A. I feel quite sure of it.

Q. Let's put it in this way: how far outside of Pier 46, the one at which you were lying, did you get at any time?

A. Pier 46 and Pier 44 are about the same distance aren't they?

Q. I am asking you for your judgment now; about how far outside of Pier 46?

A. About the same distance I should judge.

Q. About the same distance out, 30 to 40 feet?

A. Yes.

Q. You feel you got 30 to 40 feet clear of the outer end of Pier 46? A. I should judge about that.

Q. Would you be surprised if I told you that Pier

(Deposition of Henry McDonald.)

46 projected out 100 feet or more from Pier 44?

A. I would be a little bit surprised, yes, I don't think it does.

Q. And if you were 30 to 40 feet out from Pier 46 and my statement is correct about that, you would still be farther out than Pier 44?

A. Yes, you will remember that we left Pier 44, you know.

Q. Yes, that is what I am basing my question on.

A. (No answer.)

Q. According to my little diagram here I make it about [71] something over 2,200 feet from Pier 44 to where you brought up about Pier 32, would you say that that is about correct?

A. 2,200 feet, I should think it was pretty nearly correct.

Q. Then if that is true you must have drifted to the northwestward about that distance from the time that your line was cast off, the second line, as you say, up to the time— A. That we struck the dock.

Q. That the collision occurred with the dock?

A. I guess likely, it would not take her long to do that.

Mr. FARWELL.—I don't think the witness understood the question. I ask that the question be repeated to him.

Q. (Repeated.) Then if that is true you must have drifted to the northwestward about that distance from the time that your line was cast off, the second line, as you say, up to the time that the collision occurred with the dock?

(Deposition of Henry McDonald.)

Mr. FARWELL.—I object to the question on the ground that the captain testified that when the line parted he was opposite Pier 42, and your question assumes Pier 44.

(By Mr. FARWELL.)

Q. Opposite what pier were you when the second line was cast off? A. Opposite 42.

Q. So that it was from that pier that you drifted? [72] A. Pier 42.

(By Mr. McGRANN.)

Q. That would make a difference, according to this, of between 300 and 400 feet? A. Yes.

Q. As modified, then, you would say that you drifted about 1800 feet? A. 1700 or 1800 feet.

Q. That is giving you 400 feet, didn't you cover any distance ahead when you first put your engines ahead and starboarded the helm after leaving the slip?

A. No, she had just stopped, just stopped and probably may have started the least bit ahead, but the few seconds that we were going she only had stopped her sternway.

Q. Is it not true that this second line slacked up as you were leaving the slip and after you cleared the pier; didn't it slack up after you cleared the pier and after you started ahead on your engines?

A. You mean this towboat stopped?

Q. No, did the tow-line slack up any?

A. Well, it could not have slacked up unless the towboat stopped towing, not to my knowledge.

Q. You were moving astern, were you not?

(Deposition of Henry McDonald.)

A. Yes.

Q. Is it not true that the second officer had hauled in a part of this line before he gave you any signal?

A. No, they started to haul it in as soon as the towboat threw it off but at the same time the second officer was making signs to me that the line had gone from the towboat. [73]

Q. Don't you think if you had had an understanding with the towboat about what you were going to do that all these difficulties would not have occurred,—isn't that true?

A. Or if the towboat had had an understanding with me, that would be better.

Q. But you were in charge of your own ship, were you not?

A. Yes, he seemed to undertake something he didn't know anything about or what he was going to do.

Q. Didn't you permit him to undertake this thing?

A. I supposed he was a harbor towboat man, proper towboat man, down around the docks there we think these men are all good men, they are supposed to be good men, we never have any trouble with them.

Q. You didn't think he was going to keep hauling you backwards all the time, did you?

A. I certainly did think so.

Q. All the way up to Hunter's Point?

A. No, no, I explained that I expected him to turn the stern around.

(Deposition of Henry McDonald.)

Q. There was a pretty good sea on, was there not, on this occasion?

A. There was the ordinary wind-lop, as we call it.

Q. Just what does that mean?

A. Just an ordinary sea.

Q. Do you know what your turning circle is, by that I [74] mean do you know how big a circle you make in turning under a hard astarboard helm?

A. It all depends on circumstances, if there is any wind the ship will turn around slower than if there is no wind, much slower.

Q. So under the conditions prevailing on this occasion on this afternoon of March 4th, what would be the diameter of the turning circle under a hard astarboard helm on the "Edith"?

A. It would be pretty large, for the ship herself it would be pretty large.

Q. What is the best estimate you can give of the diameter of the turning point of the "Edith"?

A. Probably the radius of a diameter of 1,000 feet.

Q. Well, now, then, we have a situation according to your own testimony whereby you say you were only 30 or 40 feet off the pier end and from that position you chose to go ahead with a hard astarboard helm and hoped to turn your vessel around when you yourself admit that it would have required 500 feet sea room to get her through 8 points, would it not?

A. Provided I was doing it myself—I was depending on the towboat to turn her around, I would never have tried to do it alone.

(Deposition of Henry McDonald.)

Q. You did not signal the towboat when you went ahead on your engines and starboarded your helm, did you? A. No.

Q. How did you think that the towboat would be able to understand what maneuver you were contemplating unless [75] you gave some order?

A. Even if he didn't understand, even if he didn't granting that he didn't understand, why should he heave the line off when he knew it would assuredly get in the wheel, and towboat men do know, and know the way the ship was going and where, and knowing the circumstances and the way they turn ships I should say anyone, well, not anyone, but any other towboat would naturally turn the ship around, he knew which way we were going.

Q. You were the one who chose the moment when you would perform this maneuver of turning the ship, were you not? A. Decidedly.

Q. You chose a moment when you were only 30 to 40 feet off the end of the pier, Pier 44, according to your own testimony, to go ahead on your engines, hard astarboard your wheel and make a turn of substantially eight points, is not that true?

A. Yes, but—

Q. Wait a moment now, that is enough; you did that without any signal or without any order to the tugboat, is not that true? A. Yes.

Q. Don't you see that it was an impossibility to have turned the "Edith" in that space against both wind and tide? A. No, sir, I don't see it.

Q. You don't concede that?

(Deposition of Henry McDonald.)

A. No, I will not; I have done it too often not to know.

Q. You did not hear the master of the "Fearless" suggest [76] to you to back your engines, I believe? A. No, I did not.

Q. As to the fouling of the propeller, you now know, of course, that the propeller, if it was fouled at all, at the time you thought it was, was not fouled sufficiently to have prevented moving the engines, was it? A. We found that out afterwards.

Q. So that you were acting under a misapprehension of the situation, were you?

A. Apparently, yes.

Q. That is obvious, because you did get up to Hunters Point with the propeller in the same condition? A. Yes.

Q. Do you know how long the "Fearless" is?

A. No, sir, I don't.

Q. Do you know, again, how long the tow-line was that you took out when you left the slip first?

A. I don't really know the length of it, I should judge 20 to 30 fathoms, something like that, I can't say exactly; 30 would give what the towboat would ask for, I don't really know the length of it.

Redirect Examination by Mr. FARWELL.

Q. Referring to the sketch that you have made, Claimant's Exhibit "A," is that a correct representation of the situation of the "Edith" at the time the third hawser parted, with reference to the distance that her bow was off the line of Pier 34, for instance?

(Deposition of Henry McDonald.)

A. Well, no, that is [77] not correct, it is simply—it is too close.

Q. And with reference to the "Edith" being half way between Piers 34 and 32, was the "Edith" in that position when the third line parted?

A. Well, I could not say about her being half way between the docks, but I judge she was 200 to 250 feet from Pier 32.

Mr. McGRANN.—I object to this endeavor to alter the witness' testimony. If he does want to make a change in it I would like to have him indicate just what is wrong about it.

A. (Continued.) Of course this (referring to sketch) is not correct, I only made it approximate.

Q. How far off from the line of Pier 34 was the bow of the "Edith" when the third hawser parted?

A. That I could not very well say, I should judge we were not as far off as we were off Pier 42.

Q. Referring to the diagram of Mr. McGrann, the effect of the wind would be to set you in what direction with reference to the line of piers extending from Pier 46 to Pier 32?

A. We apparently went along the range of docks the same distance, when we are in here (indicating) the tide runs more in the direction of the docks than outside of it (indicating the bow not so close to the end of Pier 44).

Q. Do you think it would be apparent to the towboat [78] captain that if he cast off the tow-line that the effect of the wind and tide would be to drift you along parallel with the ends of the piers

(Deposition of Henry McDonald.)

Mr. McGRANN.—Objected to as leading.

A. No, I don't know, I could not say that.

Q. What do you think was the cause of this disaster?

Mr. McGRANN.—Objected to as calling for a conclusion. I think the captain can state the facts.

A. Getting the line in the wheel.

Q. And what was that caused by?

A. Caused by the towboat letting it go without any orders of any kind or even tooting his whistle.

Mr. McGRANN.—Same objection.

(By Mr. McGRANN.)

Q. Without prejudice to my objection to that question—you now admit that that was a misapprehension about the tow-line being afoul of the wheel?

A. A misapprehension about it being in the wheel?

Q. Yes. A. No, it was in the wheel.

Q. You concede now that your engines could have been moved?

A. That has the same effect on your mind as if it was not.

Q. Won't you concede that your engines could have been moved?

A. Anyone would have to concede that because it was done, but the effect on your mind is just the same, I should judge. [79]

United States District Court, Southern District of New York.

A. H. BULL & COMPANY, INC., a Corporation,
Libelant,

against

THE AMERICAN STEAM TUG "FEARLESS," Her Boilers, Engines, Tackle, Apparel and Furniture,
Claimant.

Deposition taken in behalf of the libelant on the 15th day of May, 1917, at the office of Messrs. Barry, Wainwright, Thacher & Symmers, 59 Wall Street, New York City, before a notary public.

Appearances:

Messrs. PILLSBURY, MADISON & SUTRO, Proctors for Libelant,

By Messrs. BARRY, WAINWRIGHT THACHER & SYMMERS, (Mr. PRIZER);

Messrs. McCUTCHEN, OLNEY & WILLARD, Proctors for Claimant,

By Messrs. KIRLIN, WOOLSEY & HICKOX (Mr. ERSKINE).

IT IS STIPULATED that the testimony may be taken pursuant to the annexed stipulation, by a stenographer, signing, filing and certification waived; stenographer's fees to be taxable. [80]

Deposition of Sivert Hansen, for Libelant.

SIVERT HANSEN, being duly sworn and examined as a witness for the libelant, testifies as follows:

(By Mr. PRIZER.)

Q. Your name is what?

A. Sivert Hansen.

Q. You hold a license?

A. I am a licensed mate, officer.

Q. You are a licensed mate? A. Yes.

Q. You hold first mate's papers? A. Yes.

Q. How long have you held them?

A. About three months.

Q. Before that you were?

A. Held second mate's certificate when I was in the "Edith."

Q. How long ago was that?

A. Last March I left her, it was the latter part of April I left.

Q. You were on board the "Edith" in March, 1916? A. Yes.

Q. You were second mate on the "Edith"?

A. Yes, sir.

Q. In March, 1916? A. Yes, sir.

Q. How long had you been second mate on the "Edith"?

A. I have been second mate from when she was new; I think it was April I left her when she came back out here from San Francisco.

Q. From the time she was put into the service until some time in April, you were her second mate?

(Deposition of Sivert Hansen.)

A. Yes.

Q. About how long had she been in service before the accident of March 4th?

A. 6 or 7 months.

Q. You remember the accident of March 4th?

A. Yes. [81]

Q. About what time in the day did the "Edith" leave her dock?

A. Between 3 and 4 o'clock.

Q. Where was she going?

A. She was going into drydock.

Q. What was the number of the pier she was lying alongside of? A. 46.

Q. She was bow in? A. Bow in, yes.

Q. What side of the vessel was against Pier 46?

A. Port side.

Q. And the starboard side was toward Pier 44?

A. Yes, sir.

Q. Which was on the other side of the slip?

A. Yes.

Q. Where were you stationed when the maneuver of leaving the dock was begun?

A. Aft on the poop.

Q. Where was the captain?

A. On the bridge.

Q. Where was the first mate?

A. On the forecastle-head.

Q. Were you assisted by a tug? A. Yes, sir.

Q. What was the name of the tug?

A. The "Fearless."

(Deposition of Sivert Hansen.)

Q. What did the "Fearless" do first by way of pulling you out?

A. We just got a tow-line.

Q. From where?

A. From our port quarter, from our port stern.

Q. Was that the "Edith's" line? A. Yes, sir.

Q. Did you yourself pass it out? A. Yes, sir.

Q. You were in charge of the stern lines?

A. Yes, sir.

Q. And the "Fearless" took it?

A. The "Fearless" took it, yes. [82]

Q. What did the "Fearless" do?

A. The "Fearless" it went ahead with such a speed it broke it right away.

Q. Was it a good line?

A. A good line, yes, sir.

Q. Did you know its condition?

A. I know its condition.

Q. What, if any, signal had been given to the "Fearless" to go ahead?

A. Nobody gave any signals to go ahead; he went ahead himself.

Q. Had all the lines of the "Edith" been cast off then? A. No, there was a bow-line off.

Q. Had the stern-lines of the "Edith" been cast off?

A. The stern-lines was pulled in, they had a bow-line.

Q. What happened after the line broke?

A. We heaved the line and the ship was across.

Q. Which end of the ship drifted across?

(Deposition of Sivert Hansen.)

A. Stern first and then he slacked the bow-line.

Q. Who slacked the bow-line? A. The mate.

Q. She was drifting across the slip toward Pier 44? A. Yes, sir.

Q. Then what did you do about giving a new line to the "Fearless"?

A. We gave her the same line but the other end of it.

Q. The other end of the same line?

A. Yes, sir.

Q. What did the "Fearless" do then?

A. Went ahead and the captain went ahead a little with the engines; he went ahead a little too fast, so the old man he slowed [83] her down again.

Q. Who slowed her down? A. The captain.

Q. By putting the engines slow ahead?

A. Yes, sir.

Q. Then what happened?

A. Then we went out and coming out awhile he let go the stern line.

Q. Who let go the stern line?

A. The "Fearless" did.

Q. Had you given any signal to the "Fearless" to let go the stern-line? A. No, sir.

Q. Had the "Fearless" given any signal that she was going to let go the stern-line? A. No, sir.

Q. Did you know she was going to let go the stern-line? A. No, sir.

Q. Were you on the lookout as to what the "Fearless" was doing? A. Yes, sir.

Q. How far were you out at the time the "Fear-

(Deposition of Sivert Hansen.)

less'' let go the stern-line?

A. About 30 or 40 feet.

Q. From what? A. From the dock.

Q. What end of the vessel was 30 or 40 feet from the dock? A. The bow.

Q. What did you do when you saw the ''Fearless'' had let go the stern-line?

A. Gave the signal to the captain to stop the engines.

Q. Did the captain stop the engines?

A. Yes, sir.

Q. Was it necessary to stop the engines?

A. Yes, because the line was foul. [84]

Q. What happened then?

A. She was drifting and he went around to the port side and got a bow-line and tried to get the bow off.

Q. Before the ''Fearless'' got around to the bow, did the ''Edith'' drift?

A. Oh, yes, she was drifting all right.

Q. Drifting slowly or rapidly?

A. She was drifting slowly first when she started and when she came to the tide and the wind, got out, she was drifting pretty fast then.

Q. How was the tide?

A. The tide was ebb.

Q. How was the wind?

A. About southeast, I should judge

Q. How much wind was there?

A. Strong wind.

Q. Which direction did you want to go?

(Deposition of Sivert Hansen.)

A. We want to go to the drydock.

Q. Was that toward Pier 32 or in the other direction?

A. It was in the opposite direction.

Q. Did you drift toward Pier 32?

A. Yes, sir.

Q. That was where you afterward struck, was it?

A. Yes.

Q. The claimant's answer states that at the time the line was cast off by the "Fearless" you were 700 feet away from the pier, is that so? A. No, sir.

Q. You are sure of it? A. Yes, sir.

Q. Are you sure you didn't give any signal to the [85] "Fearless" to cast off the line?

A. Positive; I am positively sure of that, no signals to let go.

Q. Are you positive that they gave you no signal that they were going to let go? A. I am.

Q. Were you on the lookout? A. Yes, sir.

Q. How soon after you saw that he had let go did you report to the captain? A. Right away.

Q. How soon after that did the captain stop the engines?

A. He rang the telegraph right at once to give the signals.

Q. What, if any, head or sternway would you say the boat had at the time the engines were stopped?

A. Well, I think we had a litle sternway; we might not; I can't exactly tell.

Q. Do you remember about how far the "Edith" was from Pier 32 when the last line broke?

(Deposition of Sivert Hansen.)

A. A little over 100 feet I should think.

Q. When you reached drydock did you notice the propeller? A. Oh, yes.

Q. What did you see?

A. I saw the end of the line around the shaft, around the wheel.

Q. Did you examine the condition of the line while you were at the drydock?

A. Yes, we was looking at it always.

Q. Did anybody else look at it there?

A. Yes, there [86] was a lawyer on board, there was two of them came on board.

Q. Was the lawyer of the tug aboard?

A. I don't know *what he were,* but he was aboard looking.

Q. How new a line was it?

A. Well, it was when the ship was new they came aboard; everything was new because it was a new ship about the last part of August and that line had not been used much because it was too heavy, they didn't use it except when we was in San Francisco and had to moor with that when they had a strong tide.

Q. When you had a strong tide?

A. In San Francisco; that is the reason we used it here to moor with.

Q. You have often seen vessels towed out by tugs?

A. Oh, yes, mostly every 2 weeks, 3 weeks, I see it.

Q. What is the custom with reference to casting off a line?

Mr. ERSKINE.—Objected to as immaterial and

(Deposition of Sivert Hansen.)

irrelevant on the ground that the witness is not qualified to testify as to what the custom is.

A. Well, gives us a short blast of the whistle to draw our attention if he want more line or if he want the line hauled in.

Q. You say the custom is to give a short blast of the whistle if they want you to haul the line in?

A. Sure.

Q. Are you sure they did not give any blast at this time? A. Yes, sir. [87]

Q. The answer in this case states that you had the line partly pulled in when he let go, is that true?

A. No, sir, we hadn't touched it when he let go; there was nobody knows he let go even.

Cross-examination by Mr. ERSKINE.

Q. Mate, were you on deck when the tug arrived alongside that afternoon? A. Yes, sir.

Q. How long did the tug have to wait before you were ready to start out?

A. He wasn't waiting long; we was ready when he come to give him the line.

Q. Just what was done after he arrived?

A. After he arrived he got a tow-line and he—

Q. What did he do, come up alongside and then make a turn? A. He made several turns.

Q. Before he got his line?

A. No, after he got a line he made several turns there back and forth and then he went ahead and broke the line he got.

Q. When he first came up where were you?

A. Out on the poop.

(Deposition of Sivert Hansen.)

Q. Waiting for him; how did you happen to be on the poop?

A. Because we was all ready for him.

Q. When had you gone on the poop?

A. I come on the poop when we was going to leave the dock.

Q. You were not going to leave until the tug came, were you? A. No, sir. [88]

Q. Did you go on the poop before the tug came?

A. As soon as we saw him we have the station.

Q. You didn't go until you saw her come?

A. No.

Q. You were on the poop when she got there?

A. Yes.

Q. Who did he talk to when he came alongside, the master of the tug?

A. I don't know whether he talked to the master or not, I think he did.

Q. Do you know what they said?

A. No, I don't.

Q. Was anything said about your giving them a line; who told you to give them a line?

A. We was told to give him a line.

Q. Who told you to?

A. The captain of the tug.

Q. What did he say?

A. He sung out to give him a tow-line and we gave him one and he said, Make fast.

Q. Where was the tug when he said that?

A. He lay astern.

Q. Right under your stern?

(Deposition of Sivert Hansen.)

A. No, he was a little way from us.

Q. How was he lying, with his stern or bow to your stern?

A. He was lying with his bow out pretty near.

Q. His stern toward your stern? A. Yes.

Q. How did you pass the line to him?

A. Passed over the stern with a little line.

Q. Did you have anyone on the poop helping you?

A. 3 or 4 men. [89]

Q. How much line did you put out to him?

A. About 20 or 30 fathom, I should think.

Q. Did the end of the line that you gave him have an eye on it? A. Yes.

Q. After you paid out the 20 or 30 fathoms how did you make the line fast to your boat?

A. Around the bitts.

Q. Flat cleats or upright bitts?

A. Upright bitts.

Q. Two, in pairs?

A. Two, in pairs, yes, sir.

Q. What bitts did you make the line fast to?

A. One the port side.

Q. You didn't personally handle the line?

A. No, I don't handle it; I have 3 or 4 men to handle it.

Q. Did you see how they made it fast? A. Yes.

Q. How many turns did they put on it?

A. I couldn't say how many turns they put on it but I know it was fast.

Q. Did the men stand by the line?

A. Yes, all they had to.

(Deposition of Sivert Hansen.)

Q. To haul in the line?

A. After they make it fast they don't have to hold it.

Q. They don't stand by ready to cast off if anything should happen?

A. Oh, no, they had a line out to the tug and that is fastened.

Q. What signal did you intend to give the tug when you were ready to go?

A. I didn't give her any signals at all. **[90]**

Q. How was the tug to know that he was ready?

A. Our master does that.

Q. What was the master going to do?

Mr. PRIZER.—Objected to.

A. The master he gives the tug the order when he want him to go.

Q. How does he give it?

Mr. PRIZER.—I object to that as not within the knowledge of the witness.

A. Well, that ain't up to me; I get my orders from the master and he is in charge.

Q. You said you expected the tug to get orders from the master? A. Yes.

Q. How were you expecting the master of your ship—he was on the bridge, isn't that right?

A. Yes.

Q. How did you expect the master on the bridge of your ship to give an order to the tug to go ahead?

A. By the whistle.

Q. What whistle would he make?

(Deposition of Sivert Hansen.)

A. That depends on which way they make it out between them.

Q. What?

A. They make that out between them what kind of a whistle they are going to use.

Q. They usually agree on what the signal shall be?

A. Yes.

Q. When the tug started to haul on that line you say [91] the stern lines of your ship were all right? A. Yes, I pulled them in.

Q. From where you were standing could you see the bow-line? A. Yes.

Q. How long is your ship?

A. The ship is three hundred and some feet, I think; 325 I think it is.

Q. The ship was light, was it?

A. The ship was light, yes, sir.

Q. How high was the poop-deck on which you were standing above the water level?

A. It must be about 25 feet I think.

Q. Then you were considerably above the tug's deck? A. Oh, yes.

Q. You could see everything that was going on on the tug's deck? A. Yes, sir.

Q. How far was the stern of the tug from your stern when you passed out that line; how far did you have to heave it?

A. It wasn't very far then, 4 or 5 fathoms I should think.

Q. How did you pay out 20 or 30 fathoms, did the tug move ahead to take the whole length of the line?

(Deposition of Sivert Hansen.)

A. He was moving the tug and we paid out the line until he said, Make fast.

Q. Paying out your line was a gradual process, was it? A. Yes, we didn't leave it go at once.

Q. When did you decide to stop paying out line? [92]

A. When the tug captain sung out to make fast.

Q. Where was he when he sung out to make fast?

A. He was standing just outside the wheelhouse.

Q. I mean, where was the stern of the tug off your stern? A. The tug was a little down the slip.

Q. Toward your starboard quarter?

A. Away from our starboard quarter.

Q. How far astern of it, the full 30 fathoms?

A. No, it wasn't that much; 15 or 20 fathom I should say.

Q. When had you paid out your stern line, how long before you made your towing line fast to the tug?

A. Well, we made our towing line fast to the tug before we pulled our stern lines in.

Q. You made your towing line fast and then you pulled in your stern line? A. Sure.

Q. How long after that was it that the tug started to pull? A. Right away.

Q. Just after you got in the stern line? A. Yes.

Q. When the tug started to pull, can you give me some idea how long that was from the time you first began to make preparations to heave out this line to him after he had talked with your captain,—several minutes, wasn't it?

(Deposition of Sivert Hansen.)

A. I don't know how long it was he was talking to him, how long a time it was after.

Q. From the time that he came up and talked to your [93] captain until he started to pull?

A. It wasn't long.

Q. About how long?

A. 6 or 7 minutes, I think, something like that.

Q. When the first line broke, do you know where the break was?

A. I think it was right over his stern.

Q. Right at his stern? A. I think it was, yes.

Q. That would be a short distance back from the eye on the line? A. Yes, sir.

Q. You said you had been using this line for mooring purposes? A. Yes, sir.

Q. When you used that line for mooring purposes, where would you usually put that eye, on the dock?

A. On the dock.

Q. When you were not using that line on board the ship, where was it kept?

A. It was kept down underneath the poop.

Q. On the poop-deck?

A. No, underneath, inside.

Q. How long a line was it?

A. A long line, I think it was a full cable, 120 fathoms.

Q. Do you remember when you had last used it before this occasion?

A. No, we never used it between San Francisco; we only used it when we was at San Francisco.

Q. When had you last been at San Francisco be-

(Deposition of Sivert Hansen.)

fore this accident? A. Within a month.

Q. Been there about a month before?

A. Yes. [94]

Q. And that was the last time you had used this line? A. Yes.

Q. When was it brought up on the poop-deck on this occasion?

A. The day before we came into port.

Q. Then it was left on the deck there so that you could use it?

A. Sure, we get all the lines out before we get in.

Q. Curled up on the poop-deck? A. Yes, sir.

Q. How long had you been in port?

A. 5 or 6 days.

Q. The lines were lying on the poop-deck there?

A. Yes.

Q. Had you handled it during that time?

A. No, we didn't need it for mooring in port.

Q. Had you personally handled it?

A. Yes, I handled it right along.

Q. When did you handle it, you personally, in your own hands?

A. I had a hold of the lines all the time.

Q. I thought you said a little while ago that the seamen handled the lines?

A. Yes, they handle it but I got to—

Q. You direct them? A. Certainly.

Q. But you didn't put out the lines with your own hands, did you? A. No.

Q. You didn't actually handle this line yourself?

A. I handled it many times, all of them, three or

(Deposition of Sivert Hansen.)

four [95] times; we was all looking at them.

Q. After it was put on deck the day before you arrived in port, you didn't handle this line?

A. I didn't take it up myself, no.

Q. Had you ever used this line for towing before?

A. No, we never had a tug before.

Q. Now, after the ship drifted across the slip, as I understand, you started all over again, is that it, passed the line out again?

A. Passed the same line, the other end.

Q. Was there an eye on the other end?

A. Yes, sir.

Q. An eye on each end? A. Yes, sir.

Q. The end that broke first was the end that you had been used to mooring on the dock with I understood you to say?

A. Oh, no, I didn't say that at all; sometimes we used one end and other times we used the other end; we didn't pay the same end all the time, we swung it over.

Q. It is not customary to have an eye on each end of these lines, is it? A. Yes, sir.

Q. On a 120 fathom line?

A. If you don't cut them in the middle; if you cut them in the middle you have two eyes on them.

Q. Where was the tug when you passed the other end of the line out to him?

A. About astern of us then. [96]

Q. How far astern? A. Oh, not far.

Q. Did you use a heaving line to get it to him?

A. We always use a heaving line.

(Deposition of Sivert Hansen.)

Q. How much did you pay out the second time?

A. I should say 30 fathoms or so.

Q. What bitts did you make fast to the second time? A. Starboard.

Q. That was the other bitt? A. Yes, sir.

Q. What difference was it—why did you use the other bitt?

A. Because we gave him the line from the other side, the first line from the port side and the second line was from the starboard side.

Q. After that line was made fast you started to back out? A. Yes, sir.

Q. Using your engines to help back, is that right?

A. Yes.

Q. Did you hear the signals given to the engines from where you were standing?

A. Yes, I could hear the signals.

Q. Can you describe what they were?

A. Yes, *there* was astern.

Q. How much of the wheel was out of the water?

A. A good foot, a foot and a half maybe; we didn't measure how much was out, of the wheel.

Q. I don't expect you to give it to me in inches, but roughly speaking how much?

A. Over a foot. [97]

Q. Do you know anything about the size of the wheel? A. No, I don't, no, sir.

Q. Do you know what the draft was on this occasion? A. I don't remember that.

Q. You don't know what her draft loaded is?

A. Yes.

(Deposition of Sivert Hansen.)

Q. What is that?

A. 21 foot 6 when she was deep loaded; 21 most of the time.

Q. From the time that the steamer started to use her engines to back out, do you know what was done with the engines up till the time that the tow-line was cast off?

A. Yes, he stopped and put her ahead again; she was going too fast.

Q. Where was the bow of the ship when he stopped and went ahead?

A. She was scratching along the side of the pier, I can't say.

Q. Then after going ahead so as to slow down the steamship, what was done with the engines?

A. I suppose the engines went slow awhile and then stopped, went down, I suppose, stopped her, I don't—

Q. Did he reverse her again or leave them dead after that? A. I don't know.

Q. How were the engines moving when the tow-line was cast off?

A. I think the engines was moving ahead.

Q. Had they been stopped before that?

A. The engines stopped before that—I think they did. [98]

Q. What I want to get at is this: you said that as the steamer was coming out the engine went ahead so as to slow down the speed; was that the movement that she was making when the line was cast off?

A. That was long before the line was cast off.

(Deposition of Sivert Hansen.)

Q. Between that forward movement and the last forward movement he had stopped the engines?

A. That I don't know if he stopped; I think he was going slow ahead.

Q. All the time up to the time the line was cast off?

A. I think he was.

Q. Did the tug stop her engines before it cast off the line? A. I don't know what the tug did.

Q. Couldn't you tell from her quick water whether her wheel was moving or not?

A. When I saw them leave go the line I have something else to look at except whether she was moving; we had to get the line in to get clear.

Q. How much slack was there in the line before it was cast off?

A. There was the whole length of the line when I saw him leave it go, the whole length of the line.

Q. If the tug had the eye over the bitt could it cast the eye off with a stretch on the line?

A. That is up to him; he got charge of the line.

Q. What did he do, slow down and slacken it?

A. He must slacken it; sometimes they take a turn around the bitt. [99]

Q. You said that you could see the tug; couldn't you see what was being done?

A. I could see the tug but I wasn't watching what he was doing with the line.

Q. What were you watching?

A. I was watching to see if we was going to get out; we have got the fenders to look out for.

(Deposition of Sivert Hansen.)

Q. Your duty on the stern is to keep an eye on the towing line?

A. But we are not supposed to watch the tug too; he is supposed to give us a signal what to do.

Q. Who is? A. The tug captain.

Q. What signal did you expect the tug to give?

A. I expected the tug captain to blow a short blast the same as the rest of them do.

Q. Had you ever been towed by that tug before?

A. No.

Q. Did you ever have any conversation with her master before starting out as to what signals he would give you? A. No, sir.

Q. Where was the line when you noticed that the tug was going to cast off?

A. The line was right on her port quarter.

Q. On your port quarter?

A. Yes; my stern line was cast off.

Q. Where had you been looking just before that?

A. I don't know just before that.

Q. Where were you standing so that you did not see [100] the line actually cast off the tug?

A. I was around the poop.

Q. Which side?

A. Well, I can't say which side I was on; I was always walking from one side to another; I suppose I was on the side next to the dock to see that we didn't do any damage to the docks, nor anything.

Q. The line was around your port quarter when you first saw it? A. Yes, sir.

Q. And then you signaled to your captain to stop?

(Deposition of Sivert Hansen.)

A. I signaled to the captain and he signaled to stop.

Q. I understood you to say that he telegraphed at once?

A. He telegraphed at once to stop the engines.

Q. How did you know the line was afoul of the wheel?

A. I didn't know the line was foul of the wheel, but I knew it would be foul; the wheel was moving and the line was in the water and I knew it would be foul.

Q. As far as you can say, you don't know when the line got on the wheel?

A. No, I don't know; of course we heaved her right in.

Q. All you know is you saw the line on the wheel when you got to drydock? A. Yes.

Q. How did you happen to know how far the bow of your ship was away from the pier when this line was cast off?

A. I judge how far it was off; of course it was off a few fathom; nobody could say. **[101]**

Q. How did you happen to notice it; weren't you looking at the line?

A. No, I was looking over the side because I saw there was something going to happen.

Q. After this second line was cast off, after you signaled to the master to stop the engines, did you remain on the poop until the time of the collision?

A. Yes, sir, right on the poop.

(Deposition of Sivert Hansen.)

Q. You don't know what happened up at the bow then?

A. No, I don't know what happened up at the bow, more than the mate told me.

Q. What kind of anchors did you have on board the ship? A. Patent anchors.

Q. How much did they weigh?

A. Those patent anchors were a good-sized anchor; I couldn't say exactly how much they weigh.

Q. About how much?

A. About a ton and a half.

Q. What do you have to do to put out those anchors? A. Have to open the brake and—

Q. Clear the brake base and they go out?

A. Oh, yes.

Q. Do you know what pier the ship was off when the tug cast off the tow-line?

A. She was off 44 then.

Q. Now you were looking over the side of the ship just prior to the time that the line was cast off, and you didn't see the line cast off the tug?

A. No, I didn't see the line cast off. [102]

Q. Do you know how long it was from that moment when you first saw the line until you last noticed it on the tug; in other words, how long had you been looking over the other side of the ship?

A. For a minute or longer, I couldn't say exactly.

Q. Whatever period it was, you didn't know what was going on as far as the line was concerned?

A. Oh, no, I know the tug was going ahead, that is all.

(Deposition of Sivert Hansen.)

Q. It was going ahead when you last saw it?

A. Yes.

Q. But whether the tug stopped and slackened up the line, you don't know? A. No.

Q. And you don't know what happened on your ship? A. No.

Q. I want to know just what you saw; if you were looking over the other side of the ship, you didn't see what was the condition of the line?

A. No, I didn't see them let got the line, no.

Redirect Examination by Mr. PRIZER.

Q. Did you notice the tug after they let go the line?

A. No, sir—I saw the line was loose, oh, yes.

Q. You were paying general attention to the line?

A. Oh, I pay attention to the line, yes, of course when we give the tug the line we don't stay and keep our eyes on that line; we have got something else to do; [103] if he want more line he give us notice and if he want the line hauled in he leave us know.

Q. You were not giving him orders?

A. No, sir.

Q. Do you remember when the tug took the third line?

A. I know we went forward and got a line from the mate.

Q. Did you hear the captain of the tug give any orders to the captain of your boat? A. No.

Q. You didn't hear him make any suggestions to the captain of your boat? A. No, not there.

Q. When you first took your position on the poop-

(Deposition of Sivert Hansen.)

deck before the first line was put out, who told you to take your position? A. The mate tells us.

Q. Did the first mate tell you?

A. Oh, yes, we get orders from the first mate when we are going to leave the dock and I get my gang out and he gets his gang.

Q. You did it when the first mate told you to?

A. Yes.

Q. What had you been doing before that?

A. We was on the deck at different jobs; we don't remember what kind of work we do a year ago; on board ship there are many kinds of work during the day.

Recross-examination by Mr. ERSKINE.

Q. You were down a little bit more by the stern than by the bow at that time?

A. Oh, yes, he always is. **[104]**

Q. About how much more, do you know?

A. That I couldn't exactly say.

Q. Have you any idea how much freeboard the ship had amidships?

A. No, I don't; she was empty, she had all the freeboard.

Q. About how far would her main deck be above the water line in the condition she was in then?

A. The main deck would be about 16 feet, I should think; no, 14 or 15 feet anyhow. **[105]**

In the United States District Court in and for the Northern District of California, First Division.

IN ADMIRALTY.—No. 16,031.

A. H. BULL & COMPANY, INC., a Corporation,
Libelant,

vs.

THE AMERICAN STEAM TUG "FEARLESS," Her Boilers, Engines, Tackle, Apparel and Furniture,
Respondent,

SHIPOWNERS & MERCHANTS TUGBOAT COMPANY, a Corporation,
Claimant.

Stipulation for Taking Deposition.

IT IS HEREBY STIPULATED, by and between the undersigned proctors for the respective parties in the above-entitled cause, that the depositions of Henry McDonald and S. Hansen may be taken at 59 Wall Street, in the City of New York, State of New York, before A. G. Charles, a Notary Public, as a Commissioner without the issuance of a commission for that purpose upon this stipulation, at such time or times as may be mutually agreed upon by the eastern legal representatives of the undersigned proctors, to wit: Barry, Wainwright, Thacher & Symmers, of the City of New York, the legal representatives of the proctors for the libelant in the above-entitled cause, and Kirlin, Woolsey & Hickox, of the City of New York, the legal representatives of the

proctors for the respondent and claimant in the above-entitled cause.

AND IT IS FURTHER STIPULATED that upon the completion of the taking of said depositions, the same shall be, by said notary public, returned to the United States District Court, in and for the Northern District of California, First Division, and may be offered in evidence on behalf of any of said parties [106] to the above-entitled cause, subject to objections as to the materiality, relevancy or competency of the same.

Dated the 6th day of March, 1917.

PILLSBURY, MADISON & SUTRO,
Proctors for Libelant.

McCUTCHEN, OLNEY & WILLARD,
Proctors for Respondent and Claimant.

Depositions of witnesses Henry McDonald & Sivert Hansen taken and returned attached hereto.

May 19, 1917.

A. C. CHARLES,
Notary Public, New York County.

[Endorsed]: Filed May 24, 1917. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [107]

In the United States District Court for the Southern Division of the Northern District of California, First Divison.

Before: Hon. MAURICE T. DOOLING, Judge.

No. 16,031.

A. H. BULL & COMPANY, INC., a Corporaton,
Libelant,

vs.

THE AMERICAN STEAM TUG "FEARLESS," etc.,
Respondent,

SHIPOWNERS & MERCHANTS TUGBOAT COMPANY, a Corporation,
Claimant.

Testimony Taken in Open Court.

Tuesday, June 5, 1917.

Counsel Appearing:

For the Libelant: OSCAR SUTRO, Esq.

For the Claimant: IRA A. CAMPBELL, Esq.

Mr. SUTRO.—If your Honor please, I will read the libel; it is not very long. Omitting the formal allegation of the corporate capacity and ownership, which was admitted, it reads: (Thereupon counsel reads the libel and answer.)

There are two depositions in this case. I don't know what your Honor's feeling is about them.

The COURT.—Just introduce them.

Mr. SUTRO.—They are the depositions of Captain McDonald and the mate, Hanson. There are no objections in the examination that you care to

urge, are there, Mr. Campbell?

Mr. CAMPBELL.—No.

Mr. SUTRO.—There are none that we care to urge. The depositions [108] were taken on stipulation and there is no objection to their introduction in evidence.

I have obtained from the United States Weather Bureau a transcript of their records on March 4, 1916. Will you permit that to be used as showing the state of the wind, Mr. Campbell?

Mr. CAMPBELL.—That record is taken of course on the top of the Merchants' Exchange Building, and not down along the water front.

Mr. SUTRO.—We understood that the conditions would be about the same, with some slight variations.

Mr. CAMPBELL.—I would not stipulate to that. Your master has already testified to the velocity, which he estimated as 8 Beaufort scale, and the Weather Bureau could give you what that velocity of wind is.

Mr. SUTRO.—It is the only available record of the wind on that day, and it shows the wind between 3 and 4 o'clock was 18 miles, southeast.

Mr. CAMPBELL.—I have no objection to the record, as to what it purports to show.

Mr. SUTRO.—May it be stipulated that the tide which I took as of at Mission street and not at Fort Point, high water at 12:06 P. M. and low water 6:17 P. M.; that would be about a three-quarter ebb tide.

Mr. CAMPBELL.—I have not looked at the statements of the tide, but you say you have examined them?

Mr. SUTRO.—Yes.

The COURT.—I suppose this testimony will be transcribed?

Mr. CAMPBELL.—Yes.

Mr. SUTRO.—That would be about a two or three knot tide, as I understand it.

Mr. CAMPBELL.—I don't know anything about that. [109]

Mr. SUTRO.—I have only one more witness, and that is the surveyor of the damage of this vessel, after she was damaged, and who superintended her repairs. He will be here this morning, and Mr. Campbell said he would proceed with his witnesses.

The COURT.—If it be a fact that the vessel was damaged, the damage will not be inquired into at this time, unless there is any special reason for it.

Mr. SUTRO.—It may not be controverted, but the fact is that the propeller of the "Edith" was fouled with this line when it was cast off by the tug, which caused her to stop her engines, and that is why she drifted; the surveyor who superintended the repairs saw the vessel on the drydock and saw the wheel fouled. That is the only other point I care to clear up. That may not be controverted.

Mr. CAMPBELL.—That is not going to be controverted; we have the superintendent of the drydock here; he also saw the lines.

The COURT.—Then it is not controverted that the line did foul the wheel?

Mr. CAMPBELL.—It is not controverted that the line was around the wheel when she arrived at Hunter's Point Drydock.

The COURT.—That is what you expected to prove?

Mr. SUTRO.—I expected to prove—

Mr. CAMPBELL.—I don't care to stipulate to what the fact was in that connection because I have a man here who actually took it off the wheel.

Mr. SUTRO.—That is the libelant's case at this time.

Mr. CAMPBELL.—I may have to put my case in a little out of order, for the reason that ordinarily I would start with the master of the tug, but he has been delayed at sea, coming up the coast, and will probably not arrive until sometime after twelve o'clock to-day, so I will have to call other witnesses.

[110]

Mr. SUTRO.—There is one other matter. The charter parties are due here to-day—but the Court has already ruled that is a matter of damages.

Mr. CAMPBELL.—All right.

Testimony of John Hubacher, for Claimant.

JOHN HUBACHER, called for the claimant, sworn.

Mr. CAMPBELL.—Q. Mr. Hubacher, what is your position, what do you do?

A. I am superintendent of the drydock at Hunter's Point.

Q. And for how many years have you been superintendent of that drydock?

A. Four or five years, I guess.

Q. How many years have you been out at the Hunter's Point drydock?

(Testimony of John Hubacher.)

A. I started out there in 1878.

Q. 1878? A. Yes.

Q. Were you connected with Hunter's Point Drydock on March 4, 1916, at the time the steamer "Edith" docked there? A. Yes.

Q. What was your position then?

A. I was superintendent of the dock and docking of ships.

Q. Did you have anything to do with the docking of the steamer "Edith" on that afternoon?

A. Yes, I docked her.

Q. After she was in dock, and the dock had been drained, did you observe whether or not there was a line in her wheel? A. I did.

Q. Was there? A. There was.

Q. Did you examine that wheel to determine how it was fastened in the wheel?

A. I did not examine it. I just merely looked at it.

Q. You looked at it? A. Yes.

Q. Is that line still preserved? A. Yes.

Q. Where is it?

A. We brought it over this morning from Hunter's Point in a car and left it down here. **[111]**

Q. Down in front of the building? A. Yes.

Q. How large a line is it?

A. I judge it is an 8-inch line, I think.

Q. In how many pieces is the line? A. 2 pieces.

Q. What are the approximate lengths of the two pieces?

A. One of them is in the neighborhood of 18 feet

(Testimony of John Hubacher.)

and the other is something like 30 or 33 feet long.

Q. Now, can you take this model of the stern of a vessel, and show the Court—first I want you to tell me how you saw the line in the wheel. Just describe it so that we can get it in the record.

A. I was on top of the dock and was looking down on the wheel, and the way the engines were stopped at that time the line was wrapped around one of the blades on the port side.

Q. On one of the blades on the port side?

A. Yes; otherwise, just the way this wheel is there now; the line was wrapped around on this blade there.

Mr. SUTRO.—Pointing to the blade on the port side.

A. Yes. On the port side.

Mr. CAMPBELL.—Can you tell now the number of turns that there were around the blade?

A. No, I could not tell you about that.

Q. Did you observe as to whether or not there was an eye in the line at the end of the line?

A. Yes, there was one eye.

Q. Can you tell us with respect to the eye what part of the line it was that was wrapped around the blade?

A. The eye was wrapped around it and the fag end was hanging loose, I should judge about six feet off the blade, hanging down.

Q. Was there any part of the line that was wrapped around the shaft? A. No.

Q. Or the hub? A. No.

(Testimony of John Hubacher.)

Q. Will you just take this string that I have here with the eye **[112]** in the end of it, and just show to the Court how you observed it to be wrapped around that propeller?

A. As near as I can remember, there was about five or six feet hanging loose.

The COURT.—Of the end of the line?

A. Of the end of the line.

Q. And the eye hung down?

A. The eye was wrapped around tight on there.

Q. The eye was wrapped around tight?

A. Yes. That was, I should judge, about a foot or two off of the hub.

Q. That was the whole line, of two pieces?

A. That was the two pieces.

Mr. SUTRO.—Q. It was in two pieces on the hub?

A. Two pieces.

The COURT.—When unwrapped, it was found to be in two pieces? A. Yes.

Mr. CAMPBELL.—Q. Was the line cut in clearing it from the wheel? Did you have to cut it away from the wheel?

A. I had nothing to do with that. I did not even see them take it off.

Mr. CAMPBELL.—We will have the line brought up to court if you want it; it is a very bulky piece.

Mr. SUTRO.—I don't know that it is worth while; the Court knows what an 8-inch line is, unless the Court wants to see it.

The COURT.—No.

(Testimony of John Hubacher.)

Cross-examination.

Mr. SUTRO.—Q. You say, as I judge from your illustration there, the line was pretty well wrapped around the blade of the propeller?

A. Yes, it was wrapped on one blade.

Q. Evidently it had made several turns on it?

A. Oh, yes, quite a number of turns.

Q. Give me again the distance from the shaft to the nearest part [113] of the line?

A. I could not, exactly.

Q. You said about a foot?

A. A foot or two, in that neighborhood.

Q. How big a propeller was that, about, as near as you remember it?

A. I could not say; I suppose about a 16-foot or 18-foot propeller, something like that.

Q. 16 or 18-foot propeller? A. Yes.

Q. Then the line was really pretty close to the hub, was it not? A. Yes, within a foot or two.

The COURT.—What do you mean by 16 or 18-foot propeller?

A. That is the outside diameter of the blades.

Q. Of each blade?

A. No, the extreme end like this.

Q. And a single blade would be one-half that?

A. Less the hub.

Mr. CAMPBELL.—No portion of the line was wrapped around this shaft or stern bearing?

A. No.

The COURT.—You saw the line afterwards, after it had been removed? A. Yes.

(Testimony of John Hubacher.)

Q. And it was then in two pieces? A. Yes.

Mr. CAMPBELL.—Q. You have preserved it yourself?

A. I preserved that and kept the line in a shed over there till this morning.

Q. Did you observe the ship coming to the dry-dock? A. Yes.

Q. Was she under tow of the tug or under her own steam?

A. A towboat had a headline towing her in up to the dock.

Q. But before that—

Mr. SUTRO.—The master testified she came in under her own steam, after he crashed into the pier and found that his engine would turn, he went up under his own steam.

Mr. CAMPBELL.—I see Mr. Brackett here now.

Mr. SUTRO.—In view of the testimony, I don't know as we will want him. There is only one other point, Mr. Campbell. **[114]** It may be conceded, or if you wish we will prove it. This is a right hand screw?

Mr. BRACKETT.—To the best of my recollection it was a right hand screw.

Mr. CAMPBELL.—It is conceded it is a right hand screw.

Testimony of George W. Driver, for Claimant.

GEORGE W. DRIVER, called for the claimant, sworn.

Mr. CAMPBELL.—Q. Your business is what?

(Testimony of George W. Driver.)

A. Marine engineer.

Q. Are you now in the employ of the Shipowners & Merchants Tugboat Company? A. Yes.

Q. In what capacity—marine engineer?

A. Chief engineer of the tug "Fearless."

Q. Of the tug "Fearless"? A. Yes.

Q. Were you the chief engineer of the tug "Fearless" on March 4, 1916, at the time of this accident to the "Edith"? A. Yes.

Q. Who handled the engines of the "Fearless" during that towage service? A. I did.

Q. In what line of work is the tug "Fearless" used?

A. In towing vessels and assisting vessels, docking.

Q. Over what waters do you tow?

A. Well, the bay and river; at the present time we are on the outside, towing outside.

Q. From where?

A. From San Francisco to Port San Luis.

Q. What I am getting at, is she strictly a bay tug, or is she an ocean-going tug and bay tug?

A. She is a combination; she is combined; she does both work, inside and outside.

Q. Now, where is the engine-room on that tug?

A. Aft.

Q. Is there a house on the tug? A. Yes.

Q. Is the engine-room at the extreme end of the house? A. Yes.

Q. Is there any cabin or room between the after end of the engine-room and the stern of the tug?

(Testimony of George W. Driver.)

A. No. **[115]**

Q. On which side of the engine do you work it?

A. Port side.

Q. That is where your throttle and reversing levers are? A. Yes.

Q. And standing at the throttle, is there any way that you can look back over the stern of the tug?

A. Yes, I have windows all around.

Q. Windows all around? A. Yes.

Q. In handling the engines of a tug when she is maneuvering with a tow in a harbor like San Francisco, what is your practice as to watching the maneuvers of the tug through those windows?

Mr. SUTRO.—We object to that. He can tell what he did in this instance.

The COURT.—Let him tell what he did at this time.

Mr. CAMPBELL.—Do you recall about what time of day it was when you went down to this work?

A. Yes.

Q. What time was it?

A. In the afternoon, in the neighborhood of three o'clock.

Q. What was the condition of the weather?

A. Well, strong wind, heavy sea and ebb tide.

Q. Where did you find the "Edith" moored?

A. At Pier 46, north side.

Q. Which side? A. North side.

Q. What was done with your tug when you arrived there?

A. When we arrived there we backed in and

(Testimony of George W. Driver.)

waited for a line, and then we received a line—

The COURT.—How did she lie, what side to the pier? A. The north side of the pier.

Q. What side of the vessel to the pier?

A. Did the boat lie?

Q. Yes.

A. The towboat laid off of the starboard side, the towboat.

Q. I mean the vessel, how did the vessel lie at the pier; what **[116]** side was next to the pier?

A. The north side of the pier.

Mr. CAMPBELL.—Q. Which side of the "Edith" was next to the dock? A. The port side.

Mr. SUTRO.—She was in like this, wasn't she (pointing to diagram)?

A. Yes, just in that neighborhood.

Mr. CAMPBELL.—Q. Go ahead and tell us just what happened from that time on, as you observed it.

A. We backed in to Pier 46, to the "Edith," to the stern of the "Edith," and received a line from her, from our stern to her stern, and when they gave orders that she was ready for casting off the line, we started to pull her out.

Mr. SUTRO.—Q. When who gave orders?

A. The captain of the "Edith," to our captain.

Mr. CAMPBELL.—Go ahead and continue the storm.

A. As we pulled out, she began to back, but in the meantime as we got a strain on the line *the line,* the line that we had, the stern line that we had pulling

(Testimony of George W. Driver.)

her out, parted, and she drifted on down to Pier 44.

Q. Whereabouts did that line part, did you see?

A. No, I could not see; I think near the boat—

Mr. SUTRO.—You could not see it, could you?

A. No, it was too close down.

Q. You could not see it—

Mr. CAMPBELL.—If you have any objection, address it to the Court and not to the witness, and we will get along better.

Q. When that line parted, how was the engine of your tug working?

A. Under one bell, that is slow, moderate speed.

Q. In working the engines when you are starting a strain on a line of that sort, how do you do it—how did you do it on this day?

A. We picked up until the line is taut, and then pulled.

Q. Will you state to the Court as to whether or not you did on this [117] day jump or jerk on that line?

A. No; as we ordinarily do, pick up the line until we have got a strain on it and then pull under one bell until we get other signals.

Q. When the line parted, what did the "Edith" do? A. She drifted down on to Pier 44.

Q. On to the southerly side of Pier 44?

A. The southerly side, yes.

Q. Then what was done?

A. Then we got another line off of her and then started to pull on it and got her clear, clear of the dock, in the neighborhood of 750 feet or 700 feet, and

(Testimony of George W. Driver.)

our captain signalled to the man on the stern of the "Edith" to haul in his line; one of our deckhands held the line until the "Edith" had started ahead, and could not hold on to it any more.

Q. What deck-hand was that?

A. Kraatz, I think his name is.

Q. He is here in court? A. Yes.

Q. After the deck-hand let go of that line, what was done with your tug?

A. We went around to the bow to pick up a head-line.

Q. On which side did you pass the "Edith"?

A. The port side.

Q. The port side, or starboard side?

A. No, we landed on the port side.

Q. When you went around the "Edith"?

A. We went around the starboard side, and when we got her line it was off the port side—we took a line from the starboard and we run it off to the port side, on pulling on the line.

Q. You ran around the starboard side and took a line from the port?

A. We took a line from the starboard, and we ran it off to the port side, on pulling on the line.

Mr. CAMPBELL.—Q. When you went around, you went around on the starboard side of the "Edith"? A. Yes.

Q. And you took a line from the bow of the "Edith" on the "Edith's" **[118]** starboard side?

A. Yes.

Q. When you started to pull on that line, where

(Testimony of George W. Driver.)

was your tug then with respect to the "Edith"?

A. Then we pulled off of the port side.

Q. How was your tug heading with respect to the heading of the "Edith"?

A. We were off at an angle; the "Edith" was like this and we were off at an angle this way, to pull her up toward Hunter's Point, to pull her up in around here.

Q. What did you observe as you started to pull on that line?

A. The line surged; it was not made fast.

Q. What do you mean by "surged"?

A. Gave out, played out; it was not made fast on the boat, and we had to stop our engines.

Q. Just a moment; it surged where, on your tug?

A. Oh, no, on the "Edith."

Q. Then what?

A. When we saw that we had to stop our engines for them to make it fast on the "Edith," and when we did so we then got a strain on it and by the time we got a strain on it the line parted, the rotten line.

Q. When you were pulling on that line, at the time it parted, how were you pulling?

A. Under one bell, moderate speed, after I got the strain on her.

Q. How did you pick up the strain on that?

A. The same as I always do, very gently, until the strain comes on her, and then pull up under one bell.

Q. Standing at the throttle, or standing in your engine-room where you did, will you state whether or not you could see this line as it led from the tug

(Testimony of George W. Driver.)

to the "Edith"? A. Yes.

Q. Will you state whether or not at any time you jerked or jumped upon that line? A. No.

Q. After that line parted, what became of the "Edith"? What happened from then on?

A. She drifted down, then, to Pier **[119]** 32 and touched Pier 32—you mean the head-line?

Q. Yes.

A. She drifted down to Pier 32 and touched Pier 32 and came around on the side, facing on the end of the dock, and by the time she came around facing Pier 32 they started the engines running ahead.

Q. She came down on the corner of Pier 32, and swung around broadside? A. Yes.

Q. What became of the "Edith" after that?

A. She started up ahead with her engines and we followed along until we got up to Hunter's Point and then gave her a line.

Q. Did you have a line to her at any time between her leaving Pier 32 and reaching Hunter's Point drydock? A. No.

Q. Where did you follow along with the tug, behind?

A. We followed right along, about amidships—perhaps a little further aft than amidships.

Q. When you got to Hunter's Point Drydock, did you put her in the dock? A. Yes.

Cross-examination.

Mr. SUTRO.—Q. Your duties on the tug "Fearless" on this day were what?

A. Engineer, handling the engines.

(Testimony of George W. Driver.)

Q. What were you supposed to do as engineer?

A. Handle the engines.

Q. Handle the engines? A. Yes.

Q. Were you responsible for the passing out of lines?

A. No; I am responsible for picking up the strain on the line.

Q. Under orders from your captain, or does he get orders from you? A. What is that?

Q. Does the captain give you orders, or you give him orders?

A. The captain gives me orders, of course.

Q. And you picked up your strain on the line in accordance with his orders, didn't you?

A. No, we always do that, that is, [120] with our towboat, we always pick the strain up; we are supposed to know that.

Q. The engineer is supposed to know that?

A. Yes.

Q. You are supposed to haul up the lines of the tug, are you? A. Yes.

Q. From where you stand? A. Yes.

Q. And supposed to handle your engines, besides?

A. Yes, accordingly.

Q. Have you an assistant in the engine-room with you? A. At that day, no; he was off.

Q. Now, do you know whether the bow-line of the "Edith" had been cast off at the time that you started to pull her out of that slip the first time?

A. When the first line broke?

Q. Yes.

(Testimony of George W. Driver.)

A. It must have been or she would not have laid down on the dock.

Q. Do you know whether it was or not?

A. By the looks of the conditions of the boat, lying down on the dock, I surmised she was.

Mr. SUTRO.—I move to strike out his surmise.

The COURT.—Let it go out.

Mr. SUTRO.—Q. Do you know whether the bowline of the "Edith" had been cast off at the time that you first started to tow her out?

A. I could not say, no.

Q. Do you know whether her stern line had been cast off? A. Yes.

Q. Did you see the stern line cast off? A. Yes.

Q. Did you hear the master of the "Edith" give the captain of your tug the signal to pull her out?

A. No.

Q. I am talking now about the first time.

A. Yes, I understand.

Q. Now, after the line parted—I will ask you, by the way, whether there was a strong tide running through these slips at that time?

A. Well, yes, because it was running on the outside [121] and there must have been some tide on the inside.

Q. Is it not a fact that you had to act pretty quickly there in taking that tug out of the slip, due to the fact that the tide was running pretty strong?

A. Yes.

Q. You couldn't lose any time there. I am talking now about the time when you were on this side of

(Testimony of George W. Driver.)

the slip (illustrating). You had to move very promptly, because there was a pretty strong tide running through these slips, wasn't there?

A. Yes.

Q. You had to move pretty promptly, so as to get out and get her out clear of the slip, isn't that so?

A. With her engines, yes, with her engines assisting.

Q. Didn't you, as a matter of fact, tell Captain Gray, in the presence of Mr. Williamson, that the parting of that line was due to the fact that you had to act quickly and put a quick strain on the line?

A. I never told Captain Gray anything like that.

Q. Did you tell Mr. Williamson?

A. I don't know Mr. Williamson.

Q. If you did know him you have forgotten who he was?

A. If I see the man perhaps I would remember him; I don't know the name.

Q. Now, after the "Edith" drifted across to the southerly side of Pier 44, you took another line, didn't you? A. Yes.

Q. Was that the first line as the first one that you had that had parted? A. No.

Q. How do you know it was not?

A. Because the first one was broken.

Q. How do you know they did not give you the other end of the same line?

A. Well, the eye was gone out of that line, and the other he sent down had an eye in it.

Q. Didn't that hawser have two eyes?

(Testimony of George W. Driver.)

A. I couldn't say that.

Q. You don't know, as a matter of fact, do you, that the line that was passed to the "Fearless" after the "Edith" drifted across the [122] slip was not the same line that you had on the first occasion, do you? A. Yes, I am positive it was not.

Q. You are positive it was not the same line?

A. Yes.

Q. If the master of the "Edith," or, rather, the mate of the "Edith" testified that it was the same line, you would still think that it was not?

A. Yes.

Q. And the fact that the crew of the "Edith" say that it was not the same line does not shake your opinion in that respect? A. Not a particle.

Q. From where you were standing, how could you tell whether or not they passed out the same line?

A. I could tell because it came from the opposite side; the other end of the line was hanging down in the water.

Q. How far from the stern of the "Edith" was the broken end of that line?

A. Well, it is hard to judge the distance; I would judge about 150 or 200 feet.

Q. How many fathoms of line did you have out when you started to pull?

A. The "Edith" had it out.

Q. How many fathoms of line were out?

A. Well, that is hard for me to judge.

Q. Give us your best estimate.

A. Maybe in the neighborhood of 450 feet.

(Testimony of George W. Driver.)

Q. You had 450 feet of line out?

A. I say in that neighborhood; I could not say positively, no.

Q. You think you had more than 100 feet out?

A. Yes.

Q. When she parted?

A. Yes—I thought you meant the second line.

Q. I am talking about the second line.

A. The first line, when she parted, maybe it was 300 feet out.

Q. How much do you think she had out?

A. I say in the neighborhood [123] of 300 feet.

Q. In the neighborhood of 300 feet? A. Yes.

Q. Where did that line part with respect to the "Edith," the stern of the "Edith" and the stern of your tug? A. Nearest to the "Edith."

Q. Nearest to the "Edith"? A. Yes.

Q. Did you haul in the end that was on your tug?

A. Yes.

Q. Did the "Edith" haul in her end?

A. No; they were hauling in when they passed us another line.

Q. She was hauling in at the time she passed you another line? A. Yes.

Q. How many feet do you think were hanging over the stern of the "Edith"? A. In hauling in?

Q. No, when the line broke, how many feet were hanging over the stern of the "Edith"?

A. About 50 or 75 feet, maybe 100.

Q. Maybe 100 feet? A. Yes.

(Testimony of George W. Driver.)

Q. How long would it take a crew to haul in 100 feet of line?

A. All depending on how many men were there.

Q. Suppose there were just two men.

A. It would have taken them quite a while.

Q. 50 feet of line? A. Quite a while.

Q. About how long? A. Well, 15 or 20 minutes.

Q. To haul in 50 feet of line? **A. Yes.**

Q. Did you see them haul this broken end in?

A. They were hauling it in when they passed another line out.

Q. Did you see them hauling it in?

A. Yes, I saw them start to haul it in.

Q. How many men were working?

A. Two men.

Q. How many men were on the poop-deck of the "Edith"? A. The stern?

Q. Yes, on the stern? A. I could not say.

Q. Did the same two men that were hauling in this line pass out the [124] second line?

A. I could not say that.

Q. You saw them hauling in the line?

A. I saw them hauling the line; we were quite a distance away, and the stern was in the air.

Q. You saw them haul it in, or didn't you see them haul it in?

A. I told you I saw them start to haul it in, yes.

Q. Did you see them pass out the second line?

A. I couldn't say whether the same men passed it out or not.

Q. Did you see anybody pass it out?

(Testimony of George W. Driver.)

A. Yes, the line came down to us; who passed it out I could not say, but the line came down to us and we made it fast.

Q. But you could not tell who passed it down?

A. No; it might have been the captain; I couldn't say.

Q. In other words, you didn't see it passed down?

A. I saw the line coming down.

Q. But you did not see them passing it down?

A. I saw the line coming down; therefore, somebody must have passed it; it didn't come itself.

Q. You don't know—

A. (Intg.) I couldn't say who did it.

Q. You don't know whether it was the same men who were hauling in the other line?

A. I couldn't say.

Q. About how long was it before the "Edith" got across that slip? A. Drifting across?

Q. Yes.

A. In minutes, I couldn't say; it was done so quickly.

Q. Just a few minutes?

A. Just a few minutes.

Q. About how long after this line was parted before you took the second line?

A. A very short time; we had it fast and pulling on her inside of five or ten minutes.

Q. And she turned over? A. In backing out.

Q. You were pulling? A. We were pulling.

Q. You went out rather slowly at first until you got the line [125] taut and then you put the

(Testimony of George W. Driver.)

strain on and you assisted her out? A. Yes.

Q. From the time that this first line broke and the "Edith" drifted across here, and until you started out, you think that was a matter of about five minutes, do you? A. Somewhere about that.

Q. Not much over it?

A. I don't think it was, before we got her fast.

Q. It would not take her long to drift across that slip, a matter of 200 feet or so? A. No.

Q. What was the beam of the "Edith," if you know? A. I could not say.

Q. About 40 feet? A. I don't know.

Q. As soon as you started to pull her out, did she start backing her engines?

A. After we started to pull her she was backing.

Q. Immediately? She started right off, didn't she? A. Right along with us.

Q. You did not pull her, really?

A. Certainly we pulled her.

Q. The answer alleges you did not tow her out.

A. We assisted her out, therefore she was turning her wheel.

Q. Now, do you mean to tell me that she was turning her wheel before this broken line had been hauled in?

A. If the line was not trailing in the water, yes, it didn't make any difference.

Q. How high was she out of the water?

A. I don't know.

Q. Can you make any estimate?

A. I could not say; I don't know how high she was;

(Testimony of George W. Driver.)

she is pretty much higher than the tug, but in feet I couldn't say.

Q. 10 feet? A. Oh, yes.

Q. 30 feet? A. I couldn't say.

Q. She was not over 30 feet?

A. She was up in the air, that is all I can say. [126]

Q. She was not turning her wheel, however, at the time that this first broken end was still in the water, was she? A. Oh, no.

Q. She had hauled it in by that time?

A. She had hauled some of it in.

Q. The 15 minutes necessary to haul in that 50 feet of line had not elapsed when she started out—she still hauling the line in, as I understand you?

A. Yes.

Q. Was she still hauling her line in when you cast off the second line—the first line?

A. No, that line was in.

Q. She got that in by that time, did you say?

A. Yes.

Q. Now, will you tell me what your position was when you cast off the tow-line the second time that you cast off. I wish you would just step here and show us just where you were; show us where the "Edith" was and where you were when you cast off the second line?

A. After we cast off the second line?

Q. You say you had her about 750 feet out?

A. That was the position.

Q. Is that where you want it?

(Testimony of George W. Driver.)

A. Yes, somewhere in that position; maybe she was down a little bit lower on account of laying against—when we pulled her clear of the dock the tide caught her and the wind caught her.

Q. Now, look at that and be sure that is the way you want it. Is that the way the tug was pointing?

A. Something in that position; the tide had caught her when she came out of Pier 44 and the pair had drifted out—they had drifted down, particularly the steamship.

Q. As I understand you, the maneuver that the tug was performing was to take her out here?

A. Yes.

Q. And then drop the line? A. Yes.

Q. And then come around here to pick up the bowline? A. Yes.

Q. And coming up there? A. Yes. [127]

Q. She being pointed up here for Hunter's Point?

A. Yes.

Q. Now, at the time you cast off this line, did you notice how the helm of the "Edith" was?

A. No, I did not.

Q. You don't know whether she had it to port or to starboard? A. No, I couldn't say.

Q. But you did see that her engine was turning?

A. Her engine was backing, yes, and then stopped.

Q. At the time that you cast the line off, her propeller was going forward, was it not?

A. No, it was stopped; the propeller was stopped at the time when we cast the line off.

Q. At the time you cast this line off the propeller

(Testimony of George W. Driver.)

was stopped? A. Yes.

Q. Didn't you testify on your direct examination that she was going ahead and that you could not hold on and had to drop the line?

A. No, I said when the line was drawn off, she was going ahead, when they pulled the line away from the deck-hand—she had started ahead after the signals of the captain of the tug had been given to the men on the stern to pull the line in, which they were doing then.

Q. Let me understand this.

Mr. CAMPBELL.—You misunderstand him; that is the trouble.

Mr. SUTRO.—At the time you cast off this line from the tug, you were in this position?

A. Yes, in that position.

Q. About opposite Pier 44?

A. Perhaps a little lower than that, but in that neighborhood.

Q. This, you say, is about 700 feet?

A. Yes, somewhere in that neighborhood.

Q. That is from the stern, or from the bow of the "Edith"? A. From the bow.

Q. So that if the "Edith" is 340 feet long, it would be about 360 feet from her stem to Pier 44?

A. No, no; I said 700 [128] from her bow to the dock.

Q. From her bow to the dock? A. Yes.

Q. So that her stern would be about 340 feet further from the dock than her bow would be?

A. Yes.

(Testimony of George W. Driver.)

Mr. SUTRO.—Your Honor will find that in the deposition they speak of the vessel being 70 feet from the dock.

Mr. CAMPBELL.—30 or 40 feet from the dock.

Mr. SUTRO.—30 or 40 or 50 feet. I think in the depositions they were talking about the bow, whereas some of the other witnesses are talking about the stern; she was a ship 340 feet long, and if this dock was 160 feet longer than this one it would to some extent account for that discrepancy.

Mr. CAMPBELL.—You have only taken the depositions of two witnesses.

Mr. SUTRO.—Your answer makes the same allegation, that you were 700 feet out.

Mr. CAMPBELL.—Yes, and we will prove it.

Mr. SUTRO.—You are talking about the stern, as I understand it, and not the bow.

Mr. CAMPBELL.—I am talking about just what I have said.

Mr. SUTRO.—Then I will ask you again: You say the "Edith" was 700 feet off Pier 44?

A. Yes.

Q. Approximately? A. Yes.

Q. Are you talking about the bow of the ship, or the stern of the ship? A. The bow.

Q. You say the bow was 700 feet off?

A. There was that water between the tug and the bow of the "Edith."

Q. So that the stern was about 1000 feet off the dock—1050 feet?

A. If the "Edith" is the length you say it is, yes.

(Testimony of George W. Driver.)

Q. Now, at the time you cast off—you did cast off that stern line, didn't you?

A. The "Edith" was going ahead and pulled [129] it away from us.

Q. Did you cast the line off?

A. When it was pulled out of the hands of the deck-hand, yes.

Q. When you were towing this vessel out of the slip, what did you do with the line, before you started to pull? A. Made it fast.

Q. Where did you make it fast?

A. On the stern bitt.

Q. Is that an upright bit, or a flat bit?

A. It has four corners to it.

Q. You had the line fast on that, did you?

A. Made fast to that.

The COURT.—How, with a loop? A. Yes.

Q. The eye? A. The eye.

Mr. SUTRO.—Q. You knew that line stayed on there until you got out into this position? A. Yes.

Q. Didn't it? A. Yes.

Q. Now, when you started to undo that line, were the "Edith's" engines turning, or were they still?

A. The engines were still when we started to undo it.

Q. You had signalled the "Edith" to let go—that you were going to let go?

A. The captain had told the man on the stern that he was to hold it in his hand and he held it while they were hauling it in.

Q. Then, as I understand you, at the time the

(Testimony of George W. Driver.)

"Edith" commenced to go forward the line was in your man's hands?

A. The line was in the man's hand, holding it while the men on the after part of the boat were hauling it in.

Q. How much of a tide was running on that day?

A. I couldn't say; very strong.

Q. Three knots, at least? A. I couldn't say.

Q. Couldn't you give us any estimate?

A. I don't know. **[130]**

Q. Couldn't you give us any estimate?

A. No.

Q. Do you know what a three-knot tide is?

A. I couldn't say; I don't know what a three-knot tide is.

Q. Was it a tide strong enough to sweep a ship like the "Edith" along pretty fast? A. Yes.

Q. Was there any wind blowing?

A. Yes, strong wind.

Q. Blowing in the same direction?

A. Blowing in the same direction as the tide.

Q. So that there would be considerable pressure on the ship, wouldn't there, so as to carry it toward Dock 32? A. Yes.

Q. Now, as I understand you, before you cast this line off how many men had hold of the line on the tug? A. On the tug, one.

Q. One man was holding this line?

A. One was letting it go.

Q. He was holding it, I thought you said.

A. He was holding it until we got clear.

(Testimony of George W. Driver.)

Q. So that he was virtually holding the "Edith" in position there? A. No, that is foolish.

Q. Didn't you tell me that the line had been removed from the bitt? A. It had.

Q. That he was holding the line?

A. The man was holding the line.

Q. And the engines were stopped? A. Yes.

Q. The engines were stopped?

A. Both boats, yes, and we were drifting together.

Q. You were drifting together? A. Yes.

Q. Sort of parallel? A. Yes.

Q. Weren't you considerably to the port of the "Edith"?

A. We were just about that position until we got down a little bit lower.

Q. Considerably off the port quarter, weren't you?

A. In that position.

Q. In order to be drifting together, you would have to be nearly opposite each other, wouldn't you? Was the tug further astern of [131] the "Edith"?

A. She was just in the position I have described there.

Q. Do you think that a man holding a line on the stern of the tug could hold the "Edith" there while they were hauling in the line?

A. He was not holding the "Edith" there; he was holding the line to keep it out of the wheel while the men were pulling on it.

Q. Why should he want to keep it out of the wheel when the engines were stopped?

A. Because they always try to do a thing like that,

(Testimony of George W. Driver.)

to hold it off, so that the men can get enough of the line in so it won't go in the wheel.

Q. There was nothing to prevent the tug from going astern, was there, when the "Edith" went ahead?

A. We might have picked the line up in our own wheel.

Q. Was the line under your stern?

A. No, it was off to the starboard, where the man was holding it before he let go.

Q. Who was in charge of this operation, as you understand it? A. What do you mean?

Q. Who was in charge of taking the "Edith" out of that slip and taking her up to the drydock?

Mr. CAMPBELL.—We object to that as calling for a conclusion of the witness.

The COURT.—The objection will be sustained.

Mr. SUTRO.—Q. Who took command of this operation? A. There were two men in command.

Q. Two men in command? A. Yes.

Q. Is there any difference between a towage service, as they call it, and an assist?

A. Oh, yes.

Q. In the case of an assist, who is supposed to direct the operation?

A. Well, the man on the bridge of the boat that he is assisting.

Q. Was this an assist?

A. This was an assist, yes. [132]

Q. The captain of the tug did not get any orders, did he? A. I could not say.

(Testimony of George W. Driver.)

Q. To let go this line?

A. I could not say anything about the orders.

Q. Didn't you say that he gave an order to the mate to haul in his line? A. He did.

Q. Did anybody from the "Edith" say they wanted the line hauled in?

A. I could not say.

Q. You did not hear it? A. No.

Q. What did you hear the captain say?

A. To the men on the "Edith," to haul in the line?

Q. What did he say?

A. "Haul in your line."

Q. And at that time both engines were stopped?

A. Both engines were stopped.

Q. Now, as I understand you, while they were hauling in the line, you say the "Edith's" propeller started ahead? A. Yes.

Q. You say this line was not cast off from the tug?

A. It was not cast off, no, sir.

Q. And if your answer in this case alleges that the line was cast off from said tug after the engines were started ahead, this answer is false. Is that so?

Mr. CAMPBELL.—I object to that, your Honor, as calling for a conclusion.

Mr. SUTRO.—This is their own answer.

The COURT.—He has given his testimony; it does not add to or detract anything from it to compare it with other testimony or with the answer; it is not his answer.

Mr. SUTRO.—Q. Have you ever read the answer in this case? A. No, sir.

(Testimony of George W. Driver.)

Q. But you have talked with your principals about this case? A. Only once. [133]

Q. Only once? A. Yes.

Q. Do you know whether that was before this answer was filed, or afterwards?

A. I could not say.

Q. How long ago was it that you talked with your principals about it?

A. It seems to me to be about 8 months ago, perhaps 10 months ago.

Q. A long time after the accident. You have not talked about it since?

Mr. CAMPBELL.—You have put an answer into his mouth that he did not say; you say "a long time after the answer was filed"—

The COURT.—No, he said a long time after the accident.

Mr. CAMPBELL.—Oh, I beg your pardon, I didn't understand it.

Mr. SUTRO.—Q. You only talked once about it, you say? A. Yes.

Q. And who did you talk to?

A. Captain Gray.

Q. And that was about 8 months ago?

A. I think it was about three or four months after the accident happened.

Q. Did you observe what took place after the "Edith" started her engines ahead? Did she start her engines?

A. After the line had been cast off?

Q. Yes. A. Yes, she started her engines.

(Testimony of George W. Driver.)

Q. After the line had been cast off?

A. After it had been pulled out of the man's hands, she started her engines.

Q. And then did she stop her engines?

A. Yes, she stopped her engines.

Q. Did you observe how soon afterwards it was that she stopped them?

A. It did not seem to me very long.

Q. Pretty quickly?

A. In a few minutes.

Q. And then she commenced to drift?

A. Yes.

Q. And how far did she drift before you got the third line from her?

A. In the neighborhood of Pier 36, about between 36 and 38, I think it was we got another line. **[134]**

Q. You did get a third line from her, did you?

A. Yes, sir.

Q. Will you give us the position of the two ships when you got that third line?

A. You want me to go down there to the board?

Q. Yes.

A. It was right here (indicating).

Q. Where was the tug when you got the third line?

A. Right here (indicating).

Q. Was that about your position?

A. Yes, except we were right up against the bow.

Q. You were right up against the bow?

A. Yes, sir.

Q. She drifted that distance, from 44 to 36, pretty rapidly, did she not? A. Yes, sir.

(Testimony of George W. Driver.)

Q. And you operated as quickly as you could to get around to her bow? A. Yes, sir.

Q. And you ran around to her starboard side here?

A. Yes.

Q. And you took a line here? A. Yes.

Q. About how close to the bow were you when you got that line?

A. Right to the bow, right up to the bow.

Q. How close?

A. Oh, a piece of paper couldn't have been put between.

Q. When she passed you the line?

A. Yes, sir, when we got the line; we were waiting there for quite a little time, though.

Q. Did you hear the officer of the "Edith" ask you for a line? A. Yes.

Q. But you didn't give him one, did you?

A. He couldn't pull the line up.

Q. You say he couldn't pull the line up?

A. No, sir.

Q. What was the matter with it?

A. The line was too heavy for him to handle.

Q. What kind of a line was it?

A. I don't know the dimensions of it, but it was a big hawser.

Q. A 12-inch hawser?

A. I think that is the size of it. **[135]**

Q. Was that the only line you had on the tug?

A. That was the only line that was any good for pulling a vessel of that description.

Q. Did you have any working line on board your tug?

(Testimony of George W. Driver.)

A. The working lines we do have are very small, they are only lines to tie the boat up to the dock.

Q. Where were they?

A. They were on deck.

Q. They were on deck? A. Yes.

Q. You didn't have any line that was suitable for towing him up to Hunter's Point from the bow, did you?

A. We had that big hawser. This was an emergency case, you must understand.

Q. What was the emergency?

A. We were trying to get it on as fast as we could.

Q. I say, what was the emergency?

A. To try to prevent the boat from hitting any of the docks.

Q. When you towed him out of Slip 44, you expected to bring him out here and drop the line and come around and catch him on the bow, didn't you?

A. Yes, sir.

Q. And you know that while you were doing that he was going to drift?

A. We would have the time to do it up there in that position, we would have time to get a hawser up.

Q. You knew he would drift, didn't you?

A. Not to such an extent.

Q. You did not figure on the tide and the wind?

A. It was not a matter of figuring on the tide and the wind, it was a matter of using his engines; when he stopped his engines, there was nothing to stop him from drifting.

Q. When you took him out of this slip with a line,

(Testimony of George W. Driver.)

you said there were how many feet between you—300 or 400 feet?

A. 300 feet, or something like that. I am a bad judge of distance.

Q. About 300 feet. Is that it?

A. Yes. **[136]**

Q. You knew he would have to stop his engines to pull in that line? A. Most assuredly.

Q. Otherwise he would foul the wheel?

A. Yes.

Q. And while he was hauling in the line, and with the number of feet that you said you thought were out, and if he had two men—

A. (Intg.) You state if there were two men—I said there were two men.

Q. I asked you how many men were on the stern pulling in that line.

A. You asked me how long—

Q. Well, I will ask you now how many men were on the stern pulling it in?

A. Two men at that time.

Q. Now, I will ask you again, pulling him out of the slip with a 300-foot line, you knew that to cast that line off he would have to stop his engine?

A. That is right.

Q. And he would have to get it in before he could start his engine? A. Yes.

Q. And while he was hauling it in, his engine would be stopped? A. Yes.

Q. And he would drift?

A. To a certain extent.

(Testimony of George W. Driver.)

Q. He would drift for all the time it took to haul in that rope? A. Yes.

Q. That is correct, is it? A. Yes.

Q. And then you expected to go around on his bow and give him another line. Is that right?

A. Yes.

Q. And you didn't have a line ready?

A. We had a hawser ready.

Q. Didn't you say you couldn't pass that to him?

A. I was speaking of the emergency that we were in at that time.

Q. Is that hawser suitable for towing purposes?

A. Oh, yes, we tow with it right along.

Q. Was that hawser of the character of a towing-line suitable for the purpose of performing the maneuver which you undertook? A. Yes. **[137]**

Q. Are you sure of that? A. Yes.

Q. What is that?

A. Yes. You are speaking of pulling her from the dock and taking her to the drydock, aren't you?

Q. No, I am speaking of exactly what I said.

A. Are you speaking of the maneuver that we made down there before she hit the dock?

Q. When you started out on this undertaking, you intended to pull her out here? A. Yes.

Q. And to drop the line? A. Yes.

Q. And to run around the bow and pick her up again and take her to Hunter's drydock?

A. Yes.

Q. Now, having that maneuver in mind, I am asking you was the hawser which you had on board of

(Testimony of George W. Driver.)

the character of a towing-line suitable for the purpose of performing that maneuver? A. Yes.

Q. Absolutely? A. Yes.

Q. How long a time do you think it was between the time that that line was taken out of that man's hands, as you say, and the time you got that second line from the "Edith," or the third line, rather?

A. I could not say exactly how long it was.

Q. It was just a matter of a few minutes wasn't it?

A. It took us a little time to get around as we were delayed in getting the line.

Q. I mean, it was a matter of only a few minutes before she drifted from Pier 44 to Pier 36?

A. Yes.

Q. Taking into consideration the situation in which you found yourself, she having drifted down to Pier 36, you didn't have on board your tug a line suitable for towing her up to Hunter's Drydock, did you?

A. Oh, yes, we had a tow-line on her.

Q. What was the line?

A. A tow-line, a hawser.

Q. That hawser you are talking about?

A. Yes, sir.

Q. I thought you said you couldn't use it in that emergency? [138]

A. In the position they were in they could not hoist it on deck. If they had the men there to do it, we would have gotten it on deck, but they had no men to speak of.

(Testimony of George W. Driver.)

Q. They had no men?

A. No; one or two or three men are not enough to handle the hawser.

Q. Apart from that 12-inch hawser, do you know whether you had any other line on board your tug that would have accomplished this maneuver, that would have been sufficient to perform it? Did you have any other lines aboard?

A. I don't know what lines we had. There were lines aboard the boat, but whether they were fit for that, or not, I don't know.

Q. Then you don't know?

A. No, I don't know.

Q. You don't know whether there were any lines below?

A. I know there were lines on board.

Q. As a matter of fact, there was a perfectly good 6 or 7 inch hawser below deck, wasn't there?

A. I don't know what was below deck; I don't know.

Q. Have you ever observed on the tug "Fearless" any of your working lines with wire spliced in?

A. Yes.

Q. Did you have any of those lines on board?

A. Yes.

Q. Were they below deck?

A. They were below deck, but they were too short for that job; they are only mooring lines, lines to moor the boat up to the dock.

Q. Then this hawser was the only line you had that could do this job?

(Testimony of George W. Driver.)

A. The hawser was the line for the job.

Q. It was put on the tug for this purpose?

A. Yes, sir.

Q. For the purpose of this maneuver?

A. Not particularly this job, we do 10 or 15 jobs a day and they use it every day.

Q. You say this was an emergency, in other words, something you did not expect. Is that right?

A. Yes, that is it.

Q. Now, tell me what there was about this situation that you [139] found yourself in here where you had to act in an emergency? What was there about that situation different from what you expected when you left the slip?

A. Well, there was just this much—

Q. (Intg.) Had she drifted over there?

Mr. CAMPBELL.—Let him answer your question.

Mr. SUTRO.—Very well, I will withdraw that last.

A. It was just this, when she backed out and the line was pulled from our hands and they were slow in getting the line in and the man started his wheel and then stopped it and allowed her to drift, it put us up against it; if she had not drifted as far as she had down in that position off of 36, we would have gotten our hawser aboard and there would have been nothing to it. The man aboard the "Edith" allowed her to drift too far, and it put her in such a bad position off that dock.

Q. But he had to let her drift, he couldn't turn

(Testimony of George W. Driver.)

his engine while he was pulling in the 300 feet of line?

A. If he had a winch and the men to use the winch, he would have gotten the line in.

Q. If he had men and a winch?

A. The winch was there.

Q. Then if he had used the winch she would not have drifted so far?

A. That is the idea exactly.

Q. But she would have drifted?

A. She would have drifted a short distance and everything would be all right, and we would have gone about our business.

Q. He had to drift some, didn't he?

A. Most assuredly, yes.

Q. The way this was undertaken, he could not have been towed up to Hunter's drydock without stopping his wheel and drifting to some extent: Is that not true? A. Yes.

Q. And while he was drifting, you would have prepared to come around and give him a bow line: It that not so? [140]

A. Yes, but you must understand that we don't always give lines, we take them on these tows, on these assisting jobs we take a line.

Q. You had to give or take a line?

A. Or take a line, yes.

Q. The real cause of this difficulty, then, in your opinion, is the fact that he was slow in getting this line in when he was opposite Pier 44: Is that correct?

A. The whole difficulty is he was slow in not get-

(Testimony of George W. Driver.)

ting the line in and when he found himself in such a position, he had two anchors, and he should have dropped one of them to hold himself.

Q. He should have dropped his anchor?

A. That is it.

Q. Then that would have been an emergency, wouldn't it?

A. Yes, and we were up against it.

Q. What I am talking about now is that because of this emergency was the fact that he was slow in getting the stern line in: Isn't that so?

A. Yes, sir, that is one of the reasons, but for her to be in the position where she was down at Pier 36 is another different reason altogether.

Q. You mean he should have dropped his anchors?

A. Yes, that is it.

Q. And when you get right down to it, as I understand you, in your opinion the real difficulty, here, or the real cause when you get right down to it, was the fact that he did not pull that line in fast enough after he came out of Slip 44?

A. That was one reason, yes.

Q. That was what started the trouble?

A. That is what started the trouble.

Q. And really was the prime cause of it?

A. Yes.

Q. Why did you take a line from the starboard quarter when you took that second line? Just explain the purpose of that. Didn't you say that the second line you took was from the starboard [141] quarter of the "Edith"?

(Testimony of George W. Driver.)

A. I didn't say anything about it in my testimony.

Q. Do you know whether the second line came from the starboard quarter, or the port quarter?

A. No, but it seems to me that the second line came from the port quarter.

Q. You think that the second line came from the port quarter? A. Yes.

Q. Are you sure of that?

A. No. I say it seems to me. The first line came from the starboard quarter, and broke, and the second line came from the port quarter.

Q. Now, that is a pretty important circumstance, isn't it, which side of the ship to take a line from?

Mr. CAMPBELL.—Now, that is calling for the conclusion of the witness. It is for the court to determine whether it is an important circumstance, or not.

Mr. SUTRO.—Q. In performing these towing operations, you have a purpose in whether you take the line from the starboard quarter or the port quarter, you are governed by conditions, aren't you?

A. The captain is.

Q. Whether the line comes from one side or the other is sometimes a very important matter, isn't it?

A. I believe it is, yes.

Q. But you don't know which side of the vessel the line came from?

A. I said that I thought that the first line to fit the conditions would be from the starboard side.

Q. Well, was it?

A. I say I thought it was, and I think so yet.

(Testimony of George W. Driver.)

Q. Are you pretty sure of that?

A. I say I think it was.

Q. And the second line, you think, came from the port quarter? A. I think it did.

Q. Are you sure of that?

A. I say I think it did.

Q. Are you sure you saw those lines at all? [142]

Mr. CAMPBELL.—Oh, that's foolish.

Mr. SUTRO.—I object to that comment, Mr. Campbell.

Mr. CAMPBELL.—Well, you have been poking away at that about 40 times.

Mr. SUTRO.—I haven't been poking away at it, and I object to having the examination characterized as foolish. Just read the last question, Mr. Reporter.

(Question read by the reporter.)

A. Do I have to answer that question, Judge?

The COURT.—Yes, answer it.

A. Well, it is such a foolish question, because I have been talking about the lines right along.

Q. Just tell us whether you are sure you saw them—it is a question that can be answered easily by "Yes" or "No." A. I saw them, yes.

Mr. SUTRO.—Q. I mean these lines when you started. A. Yes, I told you I saw them.

Q. But you don't know which side of the ship they came from?

A. I told you what I thought. If you asked me what day it happened, I couldn't tell you, I couldn't be positive on it.

(Testimony of George W. Driver.)

Q. Was the "Edith" a screw steamer?

A. Yes.

Q. A right screw? A. I couldn't say.

Q. Did you see the wheel?

A. I couldn't say I saw the wheel. It seems to me the wheel was showing above the water. Positively, I could not say. I saw the churn of the water.

Q. As a matter of fact, she was light, wasn't she?

A. Yes.

Q. And being light, it is natural that a part of her propeller would be out of the water? A. Yes.

Q. And the right screw would naturally pick up anything that was under the starboard side of the vessel, would it not—that is, a screw which would be turning to the right would naturally pick [143] up anything that might be to the starboard?

A. Yes.

Q. So that if the tow-line had been, we will assume now, cast off by the tug, the single screw of the "Edith" turning to the right, would naturally tend to foul it, would it not? A. Yes.

Q. You have had some experience on board steam vessels, have you not? A. Yes.

Q. I want to ask your expert opinion on this question: Is it not a proper thing for an engineer or a captain or any officer who is in charge, if he has reason to believe that his wheel is about to foul, to stop his engines? A. Yes.

Q. That is the proper thing to do, isn't it?

A. Yes.

Q. And you would not consider it an improper

(Testimony of George W. Driver.)

thing for him to do that even though it subsequently developed that the wheel had not fouled; it is a proper precaution to take, is it not? A. Oh, yes.

Q. One of the things that an officer in charge of a steam vessel must avoid is the fouling of his wheel: Isn't that so? A. That is right.

Q. Now, with this line hanging over the stern, and a signal from the mate that the line had been cast off, would it or would it not have been the proper thing for the captain to stop his wheel? A. It would.

Q. It would have been the proper thing for him to have done so? A. Yes.

Q. Of course, you had no conversation with the captain about what you were going to do?

A. Oh, no.

Q. When you came around under the "Edith's" bow, did you make any effort to push her starboard bow around?

A. No. We lay up alongside of her waiting for a line, that is all.

Q. You didn't make any effort to shove her?

A. No.

Mr. SUTRO.—That is all. [144]

Redirect Examination.

Mr. CAMPBELL.—If you look at page 4 of Captain McDonald's deposition and page 56 of Hanson's deposition, Mr. Sutro, you will see that one man said that the line was from the starboard quarter and the other said it was from the port.

Mr. SUTRO.—Well, the Court will observe that.

Mr. CAMPBELL.—Q. In two places here at the

(Testimony of George W. Driver.)

same time, Mr. Driver, you gave this testimony, you have testified both ways in this one instance, and all your other testimony is the contrary; I want you to state now what do you mean by casting off the line, taking it off the boat?

A. Casting a line off is to throw it off the boat.

Q. Was that what you meant when you said about letting it go out of the man's hands? A. Yes.

Q. At the time that it went out of the man's hands, was the engine of the "Edith" stopped or working ahead? A. They started to work ahead.

Recross-examination.

Mr. SUTRO.—Q. You afterwards assisted the "Edith" into the drydock at Hunter's Point, you said? A. Yes.

Q. Did you put her in there? Just what did you do?

A. We gave her the big hawser and pulled her around facing the dock so she could be pulled into the dock by a line.

Q. And that hawser, of course, had a heaving line on it?

A. A heaving line is hardly heavy enough to haul up the hawser.

Q. But did it have a heaving line on it?

A. No heaving line, no. It required a good size line to take up the hawser. It had a line to draw it aboard the boat.

Q. It had a line to take the place of the ordinary heaving line?

(Testimony of George W. Driver.)

A. Yes, a line large enough to draw the hawser aboard the boat.

Q. It was a very heavy heaving line—it was a heaving line, was it?

A. No, it was a hauling line. **[145]**

Q. A good deal smaller than the hawser?

A. Yes.

Q. And intended to take the place of a heaving line, because the heaving line would not be heavy enough to draw the hawser up: Is that it?

A. Well, it answers the purpose.

Q. How long was that hauling line?

A. I don't know, I could not say.

Q. You saw it, didn't you?

A. I saw it lying on the tug. It might have been 50 fathoms or it might have been 10 fathoms.

Q. It would be over 10 fathoms, wouldn't it?

A. Oh, yes.

Q. Well, you would say it was over 20 or 30 feet long, wouldn't you?

A. It was long enough to reach the bow of the boat and draw the hawser aboard.

Further Redirect Examination.

Mr. CAMPBELL.—Q. When you were at the dry-dock, was the tug at the stern of the 'Edith'' or at the bow? A. At the bow.

Q. Are you sure about that?

A. Yes, because we pulled her head-up into the dock.

Testimony of Richard C. W. O. Kraatz, for Claimant.

RICHARD C. W. O. KRAATZ, called for the claimant, sworn.

Mr. CAMPBELL.—Q. Are you in the employ of the Shipowners & Merchants Tugboat Company?

A. Yes, sir.

Q. Do you hold a government license?

A. Yes, I do now; not at the time that this happened, though.

Q. What is it, a mate's license? A. Yes, sir.

Q. Were you on the tug "Fearless" at the time of the "Edith's" accident? A. Yes, sir, I was.

Q. What was your position aboard the tug?

A. Deck-hand.

Q. Who handled the lines from the "Edith" on the deck of the tug?

A. It was me and my partner; the cook was around there, too, at the start. **[146]**

Q. Where was the "Edith" berthed when you went to her? A. 46.

Q. Which side? A. On the north side.

Q. And when the tug went into the slip, which way did the tug go in, head in or back in?

A. Head in.

Q. When you began towing, which way were you towing? A. Headed out then.

Q. How did you get turned around?

A. I don't know; the tide, I suppose, swung it around.

Q. Is your recollection clear now as to whether you backed in or went bow in?

(Testimony of Richard C. W. O. Kraatz.)

A. I remember we put up a head-line, up the dock.

Q. You put a head-line up the dock? A. Yes.

Q. On what dock? A. On 46.

Q. What effect did the tide have upon you?

A. I suppose it put her bow up to the dock and swung her stern out, the stern down towards 44.

Q. What was the height of the stern of the "Edith" as compared with the deck of the tug?

A. Well, 20 feet, I would say.

Q. Higher? A. Yes.

Q. Did you receive a line from the "Edith"?

A. No, they passed us a line from the wharf.

Q. They passed you a line from the wharf?

A. Yes, one of the lines was fast to the wharf, and they gave that line to us.

Q. They gave you that line? A. Yes, sir.

Q. From which side of the "Edith" did that line come? A. From the starboard side.

Q. What was the position of your tug at the time that you got that line?

A. We were laying bow on to 46, and we had the stern over to 44.

Q. And whereabouts was the line passed aboard the tug? A. Aft; we made it fast aft.

Q. But where did you receive it aboard the tug first?

A. They passed [147] us a heaving line—on the bow we received it, and they gave us a heaving line and we passed it aft.

Q. You passed the heaving line aft?

A. Yes, and then hauled in the line.

(Testimony of Richard C. W. O. Kraatz.)

Q. And then you hauled in the big line?

A. Yes, sir.

Q. What was the size of that line?

A. 8 inches.

Q. What was on the end of this 8-inch line?

A. A splice, a big eye on it.

Q. A big eye? A. Yes.

Q. And did you make it fast to your tug?

A. Yes, sir, we slipped it over between the towing bitts and slipped it over one of the horns.

Q. You slipped it over one of the horns?

A. Yes.

Q. What are the horns?

A. It has four corners to it, four horns standing up, and two are sidewise and as a rule it is just taken in like that.

Q. Do you think you can make me a drawing of those bitts? A. I think so.

Mr. SUTRO.—Mr. Campbell, are you examining him now about the first line that was passed?

Mr. CAMPBELL.—Yes.

A. It is about in this shape here (showing).

Q. What parts of the bitt do you call what I have marked "A" and "B"?

A. I don't know whether they have any special name. I call the whole four of them horns.

Q. What do you call "C" and "D"?

A. I have no special name for that.

Q. You said you passed the line between the bits and over the horn?

A. Yes; that is in between the bitts; the whole

(Testimony of Richard C. W. O. Kraatz.)

business is considered the bitts, and I passed it in here.

Q. That is, you mean between "C" and "D"?

A. Yes. [148]

Q. And then you put the eye here?

A. Over here.

Q. Over "A" and "B"? A. Yes.

Mr. CAMPBELL.—I offer this drawing in evidence.

(The document was here marked Claimant's Exhibit "A.")

Q. After the line was made fast to the tug, what was done?

A. They gave us an order to let go the lines on the tug, and we let that line go, we had the line up on the dock, and then we pulled around.

Q. What was done with the stern lines on the "Edith"? A. They were hauled in.

Q. Then what was done with your tug?

A. Then we pulled out of the slip.

Q. What position was the tug in when she began to put a strain upon the line? A. Stern to stern.

Q. Stern to stern? A. Yes, sir.

Q. How were their courses?

A. Well, I would say in a southeasterly direction.

Q. Was the tug straight behind the "Edith" or was she angled?

A. She was angled; the "Edith's" stern was inclined to swing over to 44 before we put the strain on her, I think.

Q. Which way was the tug pointing?

(Testimony of Richard C. W. O. Kraatz.)

A. It was pointing out, out between the slips.

Q. And when you started ahead on your tug, was any hawser paid out from the "Edith," did they pay out this line that you made fast to your tug?

A. Yes, we started ahead slowly, and then the skipper swung out to make fast the line, and they made it fast, and we began to pull on it.

Q. When you began to pull on that line, what kind of a strain did you put on it?

A. We started up slowly and put an even strain on it; after that I don't know what strain was put on it.

Q. State whether or not you jumped the line or jerked the line? [149]

A. No, she fetched up slowly; she fetched up slowly and then steadied tight until it busted.

Q. What happened to the line? A. It parted.

Q. Whereabouts did it part?

A. Right next to the splice.

Q. Where was that with respect to the bitts on your tug?

A. It was four feet from the bitts.

Q. It was four feet from the bitts? A. Yes, sir.

Q. What happened to the line then?

A. Nothing happened; it went overboard from the tug.

Q. Was it hauled in by those on the "Edith"?

A. Yes, it was.

Q. How long was the line at the time that it broke?

A. I should say somewhere around 15 fathoms.

Q. Then what happened after that line parted?

(Testimony of Richard C. W. O. Kraatz.)

A. She drifted over to 44.

Q. Did you save that eye of the line?

A. Yes, sir, we did.

Q. You say the steamer drifted to 44?

A. Yes, she drifted over to 44.

Q. Then what was done after she was alongside of 44?

A. We passed up another line and started pulling again.

The COURT.—Q. You passed up a line?

A. No, they gave us a line; we passed up the heaving line.

Mr. CAMPBELL.—Q. What size line did you get the second time?

A. I think it was an 8-inch line.

Q. How did it look, compared with that of the first line?

A. I would say the two of them were maybe one line, or maybe not; they both looked to me to be the same size.

Q. From which quarter did you get that line?

A. From the port quarter.

Q. And what did you do with it?

A. Made it fast on the bitts again.

Q. How was the end of that line, what was the condition of it? Was there an eye in the end of that line?

A. There was an eye in the [150] end of that line, too.

Q. And how did you make that fast on your bitts?

A. The same way as the other.

(Testimony of Richard C. W. O. Kraatz.)

Q. How much of that line did they pay out to you?

A. They gave us about 40 to 50 fathoms, I would say.

Q. After that was made fast, then, what did you do? A. We commenced to pull on it.

Q. What happened after that; go ahead and tell us?

A. We pulled out from the slip, and we were somewhere around 800 feet out of the slip, I think, and the skipper said, "All right, let go," and then I took it off the bitts and held onto the line as long as I could, and then I let go. Then I never paid any more attention to it and I went up forward. While we were passing the bridge, the skipper sung out to the man, I think it was the captain, and he hollered out to him, "Give me a good line up by the bow," and the mate repeated it, he sung out, "Give him a good line over the bow."

Q. What was it that caused the line to slip out of your hands? A. I couldn't hold onto it any longer.

Q. Why not?

A. Because there was too much weight on it.

Q. At that time did you observe whether the "Edith's" wheel was working?

A. When I let go I think it started up.

Q. But prior to your letting go, or between the time that you had cast the line off the boat, or taken it off the boat, and the time of throwing it off the tug, what had *been with* the line aboard the "Edith"?

A. They hauled it in.

Q. How much line was out at the time you let it

(Testimony of Richard C. W. O. Kraatz.)

go from your hands, in your judgment?

A. I should say somewhere around 15 fathoms.

Q. How far off the "Edith" do you think your tug was at that time?

A. We were not very far from it.

The COURT.—Q. I should say about 15 fathoms.

A. No, the line was trailing a little behind; when the line is 15 [151] fathoms, a part of it was hanging in the water, and there was considerable strain on it.

Q. Then it would be a little less than 15 fathoms, would it? A. Yes, sir.

Mr. CAMPBELL.—Q. After the line was let go, you said you went forward on your tug? A. Yes.

Q. What did your tug do?

A. We went right underneath his bow.

Q. On which side did you pass him to get to his bow? A. The starboard side.

Q. What was it you said transpired between the two captains?

A. He hollered to him, "Give me a good line over the bow," and the skipper repeated it, and then he sung out to the mate forward up on the forecastle-head to give him a good line.

Q. The captain of the "Edith" sung this out to the man up on the forecastle-head of the "Edith"?

A. Yes.

Q. When you took your position at the bow, how did the two vessels lie?

A. She was right up against the "Edith's" bow; you couldn't have got a sheet of paper in between,

(Testimony of Richard C. W. O. Kraatz.)

we couldn't have got any closer.

Q. Were there any marks left on the fender of the tug from the contact?

A. Yes, there is a dent in the guard there, yet,—I don't know whether they have taken it out, or not.

Q. What transpired when you reached the bow of the "Edith"?

A. There was an argument started as to who was going to pass a line.

Q. What was the argument.

A. The mate hollered from the forecastle-head, "The bum towboat hasn't got lines." The skipper sung out to the mate, "You couldn't pull up that line if I gave it to you." That lasted for about three minutes. Finally the mate decided he would give us a line.

Q. Where did he pass that line to you?

A. We made it fast on the [152] bitts again.

Q. From which side of the "Edith" did that come down to you? A. On the starboard.

Q. And where did you make that fast?

A. On the towing bitts again.

Q. Then what did you do with your tug?.

A. We commenced to go ahead on her.

Q. Which way did you head the tug, which way did she run?

A. We headed her right in the wind; that would be somewhere around southeast.

Q. How was the line of your tug with respect to the line of the steamer?

A. It was at an angle. We were pulling up to

(Testimony of Richard C. W. O. Kraatz.)

windward, you might say, from the "Edith."

Q. Just tell us now what took place when you began to pull?

A. When we commenced to pull, we were quite a few feet out, and after we commenced to put a little strain on it the line commenced to render at the bitts.

Q. What do you mean by that?

A. It slipped out, it paid out.

Q. From what bitts?

A. From the side bitts on the "Edith's" bow, They had it up on the forecastle-head, they had two bitts there, if I remember right, and it was made fast from one of them.

Q. What is the effect of its rendering on this bitt?

A. It paid out more line.

Q. How much line did you have out finally when they made it fast? Just give your best judgment?

A. It was all of 500 feet; there was considerable then paid out.

Mr. SUTRO.—At which time was this?

Mr. CAMPBELL.—When he began to put the strain on; when the line was made fast, my question was.

Q. What kind of a strain did you put upon that line?

A. We fetched up slowly on her; I don't know what strain they put on her any more. [153]

Q. How did you start to pull on it?

A. The line tightened up slowly. I don't know how much strain was put on her; the line was tight when it snapped.

(Testimony of Richard C. W. O. Kraatz.)

Q. How soon after it was tight did it snap?

A. After they had made fast when the line rendered, there was a man up on the bridge, and he hollered—there was nobody on the forecastle-head at the time this line commenced to render out, and somebody came jumping up on the forecastle-head and took a couple of more turns, around the bitts, and the minute those turns were taken—well, probably a minute after that it snapped.

Q. Whereabouts did she part?

A. Right next to the splice.

The COURT.—Q. On your boat, do you mean?

A. Yes, about four or five feet from the towing bitts.

Mr. CAMPBELL.—Q. You mean where the end of the line is spliced back into the main part of the line so as to form the eye?

A. Yes, sir.

Q. What was it you said about somebody on the bridge of the "Edith"?

A. There was nobody on the forecastle-head at the time this line commenced to render out and somebody came jumping up on the forecastle-head and took a couple of more turns.

Q. What was said? You said somebody called out something from the bridge of the "Edith." When your line began to render, I understood you to say somebody called out from the bridge of the "Edith." A. Yes.

Q. What did they say?

A. I couldn't hear what they hollered, but some-

(Testimony of Richard C. W. O. Kraatz.)

body came running up and I supposed they hollered out that the line was rendering.

Q. How many men did you see the mate have on the forecastle-head at the time he passed this line from the starboard-bow?

A. There was him and two more.

Q. Him and two more? A. Yes. [154]

A. Yes.

Q. What is your judgment as to whether or not it would be possible for those three men to have hauled this large hawser onto the "Edith"?

A. Well, all I have got to say is that if they were as lazy as the rest of them they would never have got the line up.

Mr. SUTRO.—I move that that answer be stricken out.

Mr. CAMPBELL.—I have no objection; let it go out.

Q. What I want is your judgment as to whether or not three men would have the strength sufficient to haul that line aboard.

A. No, three men would not be able to haul up that line.

Q. What size line was it? A. A 12-inch hawser.

Q. What was there on the end of it?

A. A wire pennant.

Q. And how long was that wire pennant?

A. That wire pennant would be about 20 fathoms —well, somewhere around 18 fathoms, 17 or 16; I think it would be 16 fathoms.

(Testimony of Richard C. W. O. Kraatz.)

Q. After the second line parted, then what happened?

Mr. SUTRO.—I think we are calling that the third line, now.

The WITNESS.—That would be the third line, wouldn't it?

Mr. CAMPBELL.—Q. After the line from the bow parted; it was the second parting of the third line; what took place after the bow-line parted?

A. The skipper hollered out to go astern of her; as soon as the line parted he hollered out to go astern of her.

Q. When you say the skipper, who do you mean?

A. Our captain.

Q. He hollered out what?

A. To go astern of her.

Q. To the "Edith"? A. Yes.

Q. Did you hear any response to that?

A. Yes, he hollered "I can't." That is all he said.

Q. Then what happened?

A. Then he commenced to drift down onto the other dock, onto 32.

Q. Before she struck 32, what, if anything, was done to the engines [155] of the "Edith"?

A. The engines commenced to move; whether they were going ahead or astern, I could not say; I suppose she was going astern.

Q. How do you know the engine began to move?

A. I could see the water thrown up.

Q. How did the "Edith" strike the dock?

A. Hit on the corner, on the starboard quarter.

(Testimony of Richard C. W. O. Kraatz.)

Q. Which corner of Pier 32?

A. On the south side, the southeast corner or the south corner.

Q. Then what happened after that?

A. We drifted around there for a while and she straightened up again and she pointed up to Hunter's Point then, so we followed her.

Q. Did you assist her up to Hunter's Point?

A. No, she went up on her own steam.

Q. When you got up to Hunter's Point, did you assist her into the drydock?

A. Yes, we passed her the hawser then.

Q. How was that hawser passed aboard?

A. They hauled it on board her.

Q. With what? A. With the winch.

Q. Whereabouts was the winch located?

A. On the lower deck.

Q. Where did they get the hawser aboard?

A. I don't know exactly, but it was a little distance from Hunter's Point before we got up there.

Q. I don't mean that, I mean whereabouts on the "Edith" was the hawser passed to the "Edith"?

A. It was passed up on the port quarter.

Mr. SUTRO.—The port quarter?

A. Well, the port stern is really more like it There are two chocks, one chock on each side, and sometimes we call it the quarter and sometimes the stern; I would say it was the stern, the stern of the "Edith."

Q. By means of what line did they haul this hawser up?

(Testimony of Richard C. W. O. Kraatz.)

A. Passed up a heaving line, and then in between the heaving-line [156] and the hawser when we do use the hawser I always had a hauling-line.

Q. What did they do with the hauling-line, where did they take that?

A. They took that down to the winch.

Q. That was on the main deck of the vessel?

A. Yes.

Q. Where was that with respect to the poop?

A. You mean the winch?

Q. Yes. A. It was on the lower deck.

Q. And where was it with respect to the break in the poop?

A. I don't know how far it was from the poop.

Q. Was it in front of the poop?

A. Yes, it was right next to the poop.

Q. How far off Pier 44 or away from Pier 44 was the "Edith" at the time that the line was cast off from the tug?

A. Well, I would say all of 800 feet.

Q. And where, in your judgment, were the two vessels at the time the second hawser—the third hawser, parted, the third line from the bow parted?

A. She was off 36 at the time the third line parted.

Q. What was the distance, in your judgment, off Pier 36? A. Well, it was all of 200 or 250 feet.

The COURT.—We will take this matter up again at two o'clock.

(A recess was here taken until two P. M.) [157]

(Testimony of Richard C. W. O. Kraatz.)

AFTERNOON SESSION.

RICHARD C. W. O. KRAATZ, recalled.

Cross-examination.

Mr. SUTRO.—Q. Can you tell us how much line you had out when you started to pull out of Pier 44?

A. When we commenced to pull the first time or second time?

Q. I will withdraw the question. As I understand you, the first time you pulled the "Edith" it was up against Pier 46? A. Yes.

Q. Then that line parted? A. Yes.

Q. That is a starboard line; that is, it was off the "Edith's" starboard quarter. Is that correct?

A. Yes.

Q. Now, after it parted and she went over to Pier 44, you then got a line and went out with it. How much line was out when you started to pull?

A. I think that line was about 150 feet, I should judge.

Q. So that there would be 150 feet distance between your stern and the stern of the "Edith"? A. Yes.

The COURT.—Q. You mean after it was fastened?

A. Yes, after it was fastened—that is, the line that we put on her was about 150 feet between our stern and the "Edith's" stern when we pulled.

Q. How much to a fathom? A. Six feet to a fathom.

Q. Is that the line that you said was 50 fathoms long?

A. No, that was the head-line; the longest one was

(Testimony of Richard C. W. O. Kraatz.)

the head-line; but this was about 150 feet.

Mr. SUTRO.—This one you say was about 25 fathoms? A. 150 feet.

Q. Six feet to the fathom?

A. Yes, about 25 fathoms.

Q. That was off the port quarter? A. Yes.

Q. You are sure of that? A. Yes.

Q. You are not sure in your own mind whether that second line [158] was the same line that had been fast to you were off Pier 46, or a new line?

A. The two of them looked alike.

Q. It might have been the same line?

A. It might be and it might not; they looked alike to me.

Q. If the mate of the "Edith" should testify that that was the same line, you would not be willing to say that he was wrong?

A. That I couldn't say, but it looked the same line.

Q. What was the most line that you got from the port quarter of the "Edith"—what was the largest quantity of line that you got at any time before you cast off? A. 150 feet.

Q. She never had more than 150 feet out?

A. She might have had a foot or more, but somewhere around 150 feet.

Q. I am not quibbling about a foot or ten feet more or less. A. Yes.

Q. She had something in the neighborhood of 25 fathoms?

A. She had somewhere around 150 feet.

Q. Somewhere in the neighborhood of 25 fathoms?

(Testimony of Richard C. W. O. Kraatz.)

A. 150 feet.

Q. You said on your direct examination that she had 40 or 50 fathoms out. You want to correct your testimony in that respect, do you?

A. I don't know that I ever said 50 fathoms.

Q. If you said that you want to correct your testimony? A. Yes.

Q. What you wish to be understood as testifying to is that she had 25 fathoms out? A. Yes.

Q. Now, you went on pulling until the "Edith" got out you say about 800 feet from Pier 44?

A. Yes, all of that.

Q. Bow or stern? A. I would say bow.

Q. The bow. A. Yes.

Q. In other words, her bow, you think now, was about 800 feet out? A. The bow was 800 feet out.

Q. And if the vessel was 340 feet long, then you would say, of course, that her stern was 1140 feet off Pier 44. Is that correct? [159]

A. Somewhere near that.

Q. You do not agree, then, with the engineer in that respect.

Mr. CAMPBELL.—I object to that, if your Honor please, as immaterial and irrelevant.

The COURT.—The objection will be sustained.

Mr. SUTRO.—You think she was somewhere within 50 feet or 100 feet of that distance, do you?

A. Yes.

Q. About 1140 feet out—from the stern, about 1140 feet from Pier 44? A. Yes, all of that.

Mr. CAMPBELL.—Is that her length, 340 feet?

(Testimony of Richard C. W. O. Kraatz.)

Mr. SUTRO.—About 340 feet.

Q. You had the tug's end of that line fastened onto the bitts, didn't you? A. Yes.

Q. The bitts you have described here this morning? A. Yes.

Q. Did you take it off that bitt? A. Yes.

Q. Who told you to take it off?

A. The captain of the tug.

Q. The captain of the tug? A. Yes.

Q. Anybody working there with you?

A. Yes, the fireman.

Q. Did he help you take it off the bitts?

A. Yes.

Q. Now, then, at the time the line was off the bitt, or while you were taking it off the bitt, was that about the position of the vessels as indicated on that diagram there?

A. Yes, that is about it; it might have been a little—that is about it, I think.

Q. That is, the "Edith" was about opposite Pier 44? A. Yes, that is what it was.

Q. Her bow had paid off a little—I think that is what you call it? A. Yes.

Q. A little to the starboard? A. Yes.

Q. And you had this port quarter line, you say?

A. Yes.

Q. And the tug was off under the port quarter of the "Edith," some little distance away?

A. Yes, a little distance. [160]

Q. At any rate, the bow of the "Edith" was pointing to starboard and not to port—pointing down-

(Testimony of Richard C. W. O. Kraatz.)

stream and not upstream?

A. Yes, it pointed a little down, as near as I can remember.

Q. A little bit downstream? A. Yes.

Q. And you think the tug was as much to the port side of the "Edith" as is shown here, or more, or just at that place?

A. Well, I don't know; it could have been a little less, but that is as near as I would say it was; it might have been a little less.

Q. Do you think the tug was a little nearer the stern? A. Yes.

Q. Not quite so much to port? A. Probably so.

Q. How was the tug headed? Was she headed directly upstream, or how?

A. No—well, she would be pointed somewhere to Hunter's Point, somewhere that way.

Q. Was it *point* at right angles to the way the "Edith" was pointing? A. No, that she was not.

Q. This is almost right angles, is it not? A. No.

Q. Would you say she was pointing a little more down this way?

A. A little less she was pointing; the angle was not quite as big as it is there.

Q. About like that? A. Yes.

Q. So that she was pointing across the stream?

A. She was pointing over—well, she was pointing more than Hunter's Point; she was pointing over towards Alameda, almost.

Q. Now, at the time you took that line off the bitts, was there any strain on it?

(Testimony of Richard C. W. O. Kraatz.)

A. No; there was the weight of the line; that was all.

Q. Just the weight of that line, which swung down with the tide? A. It was hanging in the bight.

Q. How much of a bight would you say that was?

A. It was hanging quite a distance, trailing behind the "Edith" and us. [161]

Q. Let me put it this way: If there was 25 fathoms of line between you and the "Edith," what was the distance between the stern of the "Fearless" and the stern of the "Edith"; in other words, how much would you allow for the bight?

A. It might have been 15 fathoms on the stern of the "Edith."

Q. So it would be about 45 feet away from the stern of the "Edith"? A. More than that.

Q. It would be about 90 feet away from the stern of the "Edith"—about 15 fathoms?

A. Somewhere around 90 feet; it was about a ship's length of the "Fearless"—the length of the "Fearless" that it was.

Q. How long do you think it would take the men on the "Edith" to haul in that 25 fathoms of line?

A. Well, I would say somewhere around six minutes.

Q. About six minutes? A. Yes.

Q. You don't think it would take fifteen minutes?

A. No, unless they wanted to haul it all in—that is too long.

Q. Six minutes?

(Testimony of Richard C. W. O. Kraatz.)

A. Six minutes, I would say—six or seven minutes.

Q. At the time that the "Edith" started out of the dock, she had her wheel astern? A. Yes.

Q. Do you remember that the wheel of the "Edith" stopped just as she got clear of the dock?

A. No, she was still going astern; just when the skipper sang out to me, "Let go of that line," she was stopped.

Q. You mean to say that the propeller of the "Edith" at no time stopped from the time she left the pier until he sang out to you?

A. Until he sang out to me, yes.

Q. She was making considerable headway, was she not.

A. Sternway.

Q. Sternway? A. Well, no, she was not.

Q. Is it your testimony that she did not slow up her sternway by [162] stopping her engines and going slightly ahead when she got about opposite the end of Pier 44—when her bow was about opposite Pier 44?

A. No, she was not going ahead; she was commencing to kick ahead when I let the line go out of my hand; then she commenced to give a kick ahead.

Q. You said that when you went around to the starboard bow of the "Edith," there was an argument there about the line? A. Yes.

Q. The officer in the "Edith" wanted the tug to pass his hawser? A. Yes.

(Testimony of Richard C. W. O. Kraatz.)

Q. And the tug wanted the officer to pass a line to the tug? A. Yes.

Q. The tug was directly under the bow of the "Edith"? A. Yes.

Q. If you were going to pass a line from the tug to the "Edith" you could not have been in any better position to do it, could you, if you were out in the stream? A. That was as near as we could get.

Q. You could not get any closer either to take a line or give one, could you?

A. We could have probably made another 30 feet, if the captain was in a position to hold his ship there —we could have probably got a little closer.

Q. But practically you were as close as you could get? A. Yes, that was as near as we could get.

Q. Did the tug make any effort to push the nose of the "Edith" around? A. No.

Q. That is done sometimes, is it not?

A. Not with the side of the ship; you have to put the stem of the towboat against the ship in order to do it, not broadside—you can't do it broadside.

Q. That was not suggested to the master of the "Edith,"was it, that you heard?

A. I don't know anything at all about that.

Q. You were there, were you not? You heard the argument there, didn't you?

A. Yes, I was, but as I say, there was nothing [163] said about pushing.

Q. Nothing said about shoving her around?

A. No, nothing said.

(Testimony of Richard C. W. O. Kraatz.)

Q. When the propeller of the "Edith" moved forward, did you notice the "Edith's" helm? A. No.

Q. Do you know whether her helm was hard astarboard? A. I couldn't say.

Q. Don't you know that the captain tried to turn his vessel with his helm hard astarboard and relied on the tug to pull his stern around?

A. No, I never paid any attention to how the wheel was.

Q. There would not have been anything, if you wanted to do it, or if the captain of the "Edith" wanted to do it, there would not have been anything to have prevented the tug running down this way and pulling the stern around while the captain starboarded his helm and threw the bow around?

Mr. CAMPBELL.—That is a hypothetical question which I object to on the ground that this witness has not yet been shown to be qualified to answer. He is simply a deck-hand on board of this tug, not a man who was in command of the tug, or a man who was ever shown to have been in the command of a tug.

Mr. SUTRO.—The question simply calls for whether there was anything in the position of the tug to have prevented him from doing this maneuver; he was there.

The COURT.—Of course, that is manifest, without the question.

Mr. SUTRO.—I would simply like the record to show it, because the captain testified that is precisely what he tried to do; instead of doing it the tug let go.

(Testimony of Richard C. W. O. Kraatz.)

The COURT.—If you mean there was no obstruction in the way—

Mr. SUTRO.—Q. Was there anything in the position of the tug that prevented that.

The COURT.—(Continuing.) To prevent her coming around, he may testify to it. [164]

Mr. SUTRO.—That is not exactly what I meant. I meant was there anything in the position of the tug that would prevent him going to the ship's starboard and pulling her stern around?

The COURT.—Pulling the stern around, that is another matter, whether it is feasible or not is probably a question that he is not able to answer; you may get into the record the fact, if it be a fact, that there was no obstruction there that would prevent the tug making the maneuver, if it was powerful enough to push her around.

Mr. SUTRO.—I withdraw the question.

Q. There was nothing in the way that would prevent the tug from making a swing to the starboard of the "Edith" while the captain starboarded his helm, and pulling the stern around?

A. There were several barges lying there.

Q. Where were they lying?

A. They were lying somewhere around Pier 30 or 32, I would say.

Q. Down here? A. Yes, somewhere.

Q. I am talking about the time when you were opposite Pier 44; was there anything in the way of the tug doing that at that place?

A. No, not just in that very place, no.

(Testimony of Richard C. W. O. Kraatz.)

Q. I am talking about the time when you let go of that line. You understand that? A. Yes.

Q. You say that that twelve-inch hawser which was lying on the bow of the tug—was that twelve-inch hawser lying on the stern or the bow?

A. On the stern of the towboat.

Q. Did that have a wire pennant on it?

A. Yes.

Q. How about that wire pennant—how long was it? A. About 16 fathoms, I would say.

Q. 16 fathoms? A. Yes.

Q. That would be 96 feet? A. Yes.

Q. Could you tell us how high the forecastle of the "Edith" **[165]** was above the stern of the tug?

A. No; it was quite a height looking up.

Q. I do not expect you to give us these things in feet and inches. Just give us an estimate of how high you think that was above the stern of the tug?

A. I would say all of fifty feet.

Q. It surely was not more than that, was it?

A. No— 50 feet—probably a little more or a little less—anyway, 50 feet I will say.

Q. If you had been so situated that you could have passed this hawser to the "Edith," the method of doing it would have been to put the pennant through the hawse pipe, would it not?

A. Through the chock.

Q. Through the chock, you call that? A. Yes.

Q. Now, about how far below the forecastle-deck was the chock?

(Testimony of Richard C. W. O. Kraatz.)

A. It was on top of the forecastle.

Q. It is on top of the forecastle?

A. It is on top.

Q. So that the forecastle would be about 50 feet, you think, above the chock on the stern of the tug?

A. Yes.

Q. The mate of the "Edith," when you refused to pass him this line, said "That is a bum tugboat, which has no lines"; Is that what he said?

A. Yes.

Q. As a matter of fact, didn't you have some other lines?

A. Well, we had other lines, yes, but not fit for that kind of work.

Q. Is it your testimony that this 12-inch hawser was the only line that was fit for that kind of work?

A. That is the only one we had.

Q. The only one you had? A. Yes.

Q. Above deck or below deck?

A. On the top of the deck.

Q. But you did have some other lines on that tug, didn't you, that could hold the "Edith"?

A. No, none what was fit for it; [166] they are too small.

Q. Didn't you have a six-inch working line on board that tug?

A. We had a six-inch line that we had used to tie the vessel up with, that is 20 fathoms long—tie it to the dock with.

Q. Where was that?

A. That was laying on the deck.

(Testimony of Richard C. W. O. Kraatz.)

Q. What other lines did you have on board?

A. A couple of seven-inch lines.

Q. Where were they? A. On the deck, too.

Q. How long were they? A. 20 fathoms, too.

Q. Two lines 20 fathoms each? A. Yes.

Q. What other lines did you have on board?

A. Another 6-inch bow-line.

Q. How long was that? A. 20 fathoms, also.

Q. Where was that? A. In the bow.

Q. Where were the 7-inch 20 fathom lines, in the bow, or in the stern?

A. One in the bow and one in the stern.

Q. Did you have any breast lines?

A. We had a breast line at the time, but it was no good.

Q. What was the size of it? A. 7-inch, too.

Q. How long was it? A. 20 fathoms, also.

Q. Where was it? A. On the bow.

Q. You say it was no good; you mean it was an old line? A. Yes.

Q. What other lines did you have?

A. Those are the only lines we had.

Q. Did you have any lines below? A. No.

Q. Then the only line that you had longer than 20 fathoms was this 12-inch hawser? A. Yes.

Q. How long was that?

A. That I don't know; 120 fathoms, I believe it is.

Q. 20 fathoms? A. 120 fathoms.

Q. Somewhere over 100 fathoms, anyhow?

A. Yes, I think it is 120. [167]

Q. How much of that line that you got from the

(Testimony of Richard C. W. O. Kraatz.)

"Edith" did you take out from the bow?

A. We got all of 30 fathoms or 35 fathoms.

Q. 30 or 35 fathoms? A. Yes.

Q. That would be from 180 to 205 feet?

A. Yes.

Q. Now, when you maneuvered with the "Edith" out of Pier 44, when you came down here, I believe you said you had somewhere around 20 or 25 fathoms. A. Yes, 150 feet, I would say.

Q. About 150 feet? A. 25 fathoms, it was.

Q. And you had four lines, each of them 20 fathoms long, on your deck at the time that you refused to give them a line opposite Pier 38: Is that correct? A. Yes.

Q. Did you tell them what the conditions of the other lines was? You say the breast-line was a used-up line, or not a good line. How about the 6-inch bow-line?

A. They were both of them worn out from other boats before we got them.

Q. How about the 7-inch lines?

A. They were in fairly good condition.

Q. The same condition?

A. Pretty fair condition.

Q. Would you say that they were in as good condition as the line that you got from the "Edith"?

A. No, they were not.

Q. They were not? A. No.

Q. How about the six-inch lines that you just testified to, or was that your bow-line?

A. We had in the bow one 6-inch line and one in

(Testimony of Richard C. W. O. Kraatz.)

the stern, which we used to tie up the vessel with alongside of the dock.

Q. About this 6-inch line that you had in the stern, you have not told me what the condition of that was.

A. Anything but good.

Q. That was the worst of the lot, was it?

A. No, it was not the worst, but it was anything but good.

Q. None of these lines were as good, as I understand you, as the line which you got from the "Edith"? A. No. [168]

Q. At that point opposite Pier 38? A. No.

Q. When you left Pier 44 you understood, did you not, that the plan was to pull the "Edith" out some distance, wherever you thought it was proper, or your captain thought it was proper, drop the line and then come around and pick the line off the bow and take her up to Hunter's Point. Isn't that what you understood?

A. Yes, as a rule that is done; I don't know just at the present time how the captain was going to work it, but that is as a rule how it is done.

Q. As a rule it is done that way? A. Yes.

Q. That is, taking into consideration the strong ebb tide and the wind, he would drop the stern line and come around to the bow? A. Yes.

Q. Pick her up at the bow and then take her on up? A. Take her up to Hunter's Point.

Q. So far as you know, that is what he planned to do in this case?

A. Yes, that is the way it looked to me.

(Testimony of Richard C. W. O. Kraatz.)

Q. You have performed that maneuver before, have you? A. Yes.

Q. You expected the engines of the vessel to stop, didn't you, while they are taking in the line when you cast it off? A. Yes.

Q. Otherwise it is likely to foul the wheel?

A. Otherwise it is likely to foul the wheel.

Q. They have to haul that line in before they can start up again? A. Yes.

Q. And then by the time they get the line in you plan to be pretty near the bow, ready for another line, don't you? A. Yes.

Q. You expected the "Edith" to drift during this maneuver, did you not?

A. I don't know what this captain expected.

Q. I mean you would expect the "Edith" to drift?

A. She would drift a little, I suppose.

Q. She would be bound to drift some distance?

A. She would be [169] bound to drift some distance.

Q. While she was drifting, you would get in the bow and pick up a line and go on? A. Yes.

Redirect Examination.

Mr. CAMPBELL.—Q. When she backed out of the slip, what effect did the tide and wind have upon the two vessels, or upon the "Edith"; did she go straight out of the slip, or did the tide sag her down?

A. The tide shoved her down toward 44 or 42, swept her down.

Q. At the time that you actually let go of the line, out of your hands, where were you with respect to

(Testimony of Richard C. W. O. Kraatz.)

the end of 44 or 42? A. How far away?

Q. Which pier were you off the end of?

A. We were off Pier 42, I would say.

Q. Pier 42? A. Yes.

Q. Why did you let go of the line at the time that you actually let it go out of your hands; why didn't you hang on?

A. I would have gone overboard if I did hang onto it.

Recross-examination.

Mr. SUTRO.—Q. You said this morning that you had to let go because there was too much weight on it. Is that correct? A. Yes.

Further Redirect Examination.

Mr. CAMPBELL.—Q. Was the pull upon the line in your hand increased at all when the "Edith" began to turn her wheel ahead?

A. No—it might have been a little, but when there was too much weight, got to be too much weight on it, I let it go; that is all there was to it; otherwise I would have held longer onto it, if there had not been an increase of the weight.

Further Recross-examination.

Mr. SUTRO.—As a matter of fact, there was a tremendous [170] bight in that line was there not? A. There was some bight in it.

Q. It was a pretty good bight; you said a little while ago it was about a 10-fathom bight?

A. A 10 or 15—there was about 15 fathoms trailing behind.

(Testimony of Richard C. W. O. Kraatz.)

Q. That was 60 feet of line approximately, and that is what you were holding up against the tide, weren't you? A. Yes.

Q. You could not hold it any longer; is that right?

A. Yes.

The COURT.—Do you think at the time you let go of the line that the vessel was off Pier 42 instead of Pier 44? A. Yes, it was closer to 42 than 44.

Mr. SUTRO.—In view of that answer, if you were giving the position now at the time you let go of the line, you would move this little marble farther out, opposite Pier 42?

A. Yes, just a little further down; it might have been 42 and 44, but I think it was a little closer to 42.

Q. That is opposite? A. Yes.

Testimony of John Taylor, for Respondent.

JOHN TAYLOR, called for Respondent sworn.

Mr. CAMPBELL.—Q. Are you in the employ of the Shipowners & Merchants Tugboat Company?

A. Yes.

Q. Were you on the tug "Fearless" at the time of the accident to the "Edith"? A. I was.

Q. A year ago? A. Yes.

Q. What was your position on the tug?

A. Fireman.

Q. What do you know of the making fast of the line when the tug first went into the slip?

Mr. SUTRO.—If your Honor please, I object to that question, what does he know of it. He can ask

(Testimony of John Taylor.)

what he saw and what he did, not what he knows about it. [171]

Mr. CAMPBELL.—All right. When the tug first went into the slip, what did you do?

A. Backed in alongside the "Edith."

Q. Did you make fast to the "Edith"?

A. That is when I came on deck.

Q. When you came on deck? A. Yes.

Q. Where were you before coming on deck?

A. I was down in the engine-room.

Q. Down in the engine-room?

A. Before I came on deck.

Q. When was it that you backed alongside of the "Edith"?

A. When I came on deck I helped them to get the line on.

Q. Where had the tug been prior to that?

A. Laying at a head-line at the end of the pier.

Q. How was the line passed aboard the tug from the "Edith"?

A. It was passed aboard on the port side.

Q. How was it passed aboard your tug?

A. Around the bitts, with the eye over the bitts.

Q. How did they get it aboard, do you know?

A. We took it aboard with a heaving-line from the pier.

Q. Where was it fastened on your tug?

A. On the bitts, to the towing bitts.

Q. From which side of the "Edith" did that line lead? A. It led from the port side.

Q. What had the line been used for by the "Edith"

(Testimony of John Taylor.)

before it was passed to you?

A. Used to make it fast to the pier.

The COURT.—Q. You got it from the pier?

A. We got it from the pier.

Mr. CAMPBELL.—Q. How much line was paid out? How long was that line when you started to pull?

A. As near as I can say about 90 feet.

Q. What happened when you began to pull on it?

A. It parted.

Q. Where?

A. Just a little ways from the splice. [172]

Q. Did the "Edith" have any stern lines out at the time that line parted?

A. Only the one that we had.

Q. Did the "Edith" have any stern lines out to the dock?

A. She was let go altogether; when we started to pull her out the line parted.

Q. Did the "Edith" have any of the mooring lines out from her stern to the dock at the time you began to pull?

A. No; she was let go altogether when the line parted.

Q. What kind of a strain was put on the line?

A. Just a slow strain to tighten it up; we went dead slow with the engine.

Q. How long had you been pulling on the line before it parted?

A. I do not suppose she had made but a few revo-

(Testimony of John Taylor.)

lutions of the engine, that it all, when she tightened the line up.

Q. Then, upon that line parting, what happened to the "Edith"?

A. She went over toward Pier 54—alongside of 44.

Q. Was another line passed out to you?

A. There was another line passed out.

Q. From which quarter of the "Edith" was that?

A. The starboard quarter.

Q. What did you do with that line?

A. We made it fast to the bitts, as we did the first one.

Q. Did you assist in doing that?

A. I helped to do it.

Q. When that line was fast, then what was done?

A. We got a slow bell to tighten up, just went gradually until we got the strain on the line and then pulled her out—started to pull her out.

Q. How was the tide setting at that time?

A. That I don't know; I don't understand it.

Q. You don't know about the tide?

A. I don't understand the tides.

Q. What are you doing now on the tug?

A. Fireman. [173]

Q. At that time, what was your position on the tug? Were you a fireman at that time?

A. I was firing at that time.

Q. How long was that line which was the second line which was passed to you?

A. The second line?

Q. How long would you say that was?

(Testimony of John Taylor.)

A. When we started pulling out?

Q. Yes.

A. I should say between 140 and 150 feet when we got the full length of it.

Q. What was done with that line after you got away from the dock; just tell us what took place?

A. After we got away from the dock?

Q. Yes, after you pulled the "Edith" out of the slip.

A. We pulled her out, and when we got out in the stream I came on deck and stood by the line and was told to let it go off the bitts.

Q. Told by whom?

A. The captain; he told me to take it off the bitts —we had stopped then—me and the deck-hand held onto the line until such time as the captain said let go; just as he said let go, the tide pulled the line out of his hand; the captain said to let go of the line, and it pulled out of his hand.

Q. Out of whose hand? A. The sailor's hand.

Q. Kraatz's? A. I don't know his name.

Q. Did you notice at that time whether the ship's propeller was working or not?

A. The ship's propeller was working, backing all the time, as she was coming out; I couldn't say before we left.

Q. While you were actually coming out of the slip between the two piers, where were you?

A. I was down working in the engine-room giving the engine some oil.

Q. Now, at the time that you took the line off from

(Testimony of John Taylor.)

the bitts and before you threw it over the side of the tug—at the time you took it off the bitts was the propeller of the "Edith" working or [174] stopped?

A. The wheel was stopped when the line went over the stern; the wheel started again after the line went over—they started the wheel again.

Q. How far out do you think that you were from the "Edith" at the time that the line was let go?

A. At the time they let the line go?

Q. Yes.

A. I should say it was about 80 or 90 feet; it might be over 90 feet.

Q. Between the time that you took the line off the bitts of the tug and the time that you let it go from the tug, was anything done to the line?

A. After we took the line off the bitts, we started to haul it in, before we let go of the line, because the two ships will come together—they were hauling the line in.

Q. How were they hauling it in?

A. Hand over hand.

Q. How many men were hauling it in?

A. I seen two there.

Q. After the line was let go from the tug entirely, what did you do? A. I went down below.

Q. When you came on deck again, where was the tug? A. Underneath the bow.

Q. Underneath the bow? A. Yes.

Q. Did you assist in receiving the bow-line from the "Edith"?

(Testimony of John Taylor.)

A. Yes, I helped to take the line on and put it on the bitts again, the head-line.

Q. What were they doing when you actually came on deck?

A. I don't know what they were doing on deck; I heard a lot of hollering and shouting; that is all I know; I don't know what was doing.

Q. How soon after you got on deck was the line coming down from the forecastle?

A. No—I had to stand there until they got the line over the bow.

Q. Then what did you do with that line?

A. We ran it over [175] the bitts and made it fast.

Q. What was the tug doing then?

A. Getting a slow bell to go ahead.

Q. Which way did you move? A. Went ahead.

Q. Did you go on a line parallel to the keel of the "Edith," or how?

A. That I could not say; I didn't take much notice.

Q. Where were you when they put a strain on the line? A. Standing against the engine-room door.

Q. Where was the tug then with respect to the "Edith"? A. Ahead of the "Edith."

Q. Directly ahead, or how?

A. As near as I could tell you, just slanting off the bow.

Q. How did they put the strain on that line?

A. By dead slow.

Q. Then what happened?

A. At the time they were going dead slow the line

(Testimony of John Taylor.)

was surging out all the time—nobody there to make it fast.

Q. Surging out from where?

A. From the ship; she was not made fast properly; then somebody came on the forecastle-head and made it fast; I don't know who it was, it was too far to see, who made it fast, but it was made fast around the bitts; I was just inside the engine-room when that parted.

Q. Where did that part?

A. I could hardly say—about 50 feet or something over the stern; I could not say exactly.

Q. Do you recall?

A. I am not quite sure how it was.

Q. Whereabouts were you with respect to the piers at the time that second or third line parted?

A. The third line?

Q. At the time this last line parted.

A. I was standing up in the engine-room.

Q. But where were the vessels then with respect to the piers? A. The piers?

Q. What piers were they opposite?

A. I could not say which pier [176] we were off when the head-line parted; I could not say that.

Q. What happened after the head-line parted?

A. I went down below—you mean after the line parted or when I came on deck again—our captain was making toward the ship when I came on deck again.

Q. What happened after he came on deck?

A. All I know is I stood there watching the ship

(Testimony of John Taylor.)

at the time she was at the end of the pier—I couldn't say the number of the pier—she run into the pier, and then she started to go ahead and go off the pier herself.

The COURT.—As she struck the pier, was that at the time you came on deck?

A. She struck the pier at the time I came on deck.

Mr. CAMPBELL.—Q. When she left the pier, did she leave with your assistance?

A. No; she came away with her own assistance—she came away herself.

Cross-examination.

Mr. SUTRO.—Q. Mr. Taylor, you were standing on the stern of the tug when the tow-line went over the stern, that is, the first line which dropped when you were opposite Pier 44? A. Yes.

Q. You say after that line got over the stern the ship's propeller started to turn. Is that correct?

A. Yes.

Q. Then if I understand you, the "Edith's" wheel did not start to turn before the line was cast off from the tug? A. No.

Q. It did not pull the line out of the deck-hand's hands? A. Working the ship didn't pull it out.

Q. Who told you to take the line off the tug's bitts?

A. The captain.

Q. At that time the "Edith's" engines were not turning?

A. The "Edith's" engines were turning when we took it off the bitts.

Q. They were turning when you took it off the

(Testimony of John Taylor.)

bitts? A. Yes, she was backing. [177]

Q. She was backing? A. Yes.

Q. While she was backing he told you to take the line off, did he? A. Yes.

Q. By the time you got it off the bitts, she had stopped turning her wheel. Is that correct?

A. Yes.

Q. Now, at that particular time there was not any reason why you could not have put it on the bitts again, if you had wanted to, was there?

A. At the time we got it off the bitts and got it out the wheel stopped.

Q. That wheel, before it stopped, had been going astern? A. It was backing aft.

Q. You are sure of that? A. Sure.

Q. Now, you got the first tow-line which you took from the "Edith"—I am talking now about the first one. A. Yes.

Q. You got that from the dock did you?

A. Yes.

Q. Who got it off the dock?

A. Me and two of the sailors.

Q. You and two of the sailors? A. Yes.

Q. You went up there and took that line off the dock?

A. We did not get it off the dock; we fetched it from that with a heaving-line,—we brought it aboard with a heaving-line.

Q. Did you take your own heaving-line up from the dock?

A. Yes—threw it on the dock—one of the deck-hands threw it on the dock.

(Testimony of John Taylor.)

Q. Then you went up on the dock?

A. I went up on deck and helped pull it aboard.

Q. Did you yourself go on the dock? A. No.

Q. Who was on the dock that made the heaving-line fast to the "Edith's" line?

A. I don't know who it was; some of the pier men, I suppose.

Q. Some of the workmen?

A. I don't know who it was.

Q. Who told them to make that line fast up there?

A. I don't know. [178]

Q. How did you come to do that? Who told you to do it? A. Make the line fast?

Q. Make the heaving-line fast to the line that was on the dock.

A. One of the deck-hands did that; I just came on deck and helped to pull it aboard.

Q. Do you know who told the deck-hand to get that line off the dock? A. No.

Q. Did you see Mr. Driver on that day?

A. I did.

Q. He was your superior officer; he was the chief engineer? A. Yes.

Q. Were you supposed to work under his instructions? A. Yes.

Q. Did you see him down around his cabin at any time on that day?

A. Yes, I saw him at the stand, working the engine.

Q. Where is the engine-room on the "Fearless"?

A. Right aft.

(Testimony of John Taylor.)

Q. Right aft?

A. Yes, pretty near aft; you can't call it right aft; it is pretty near aft.

Q. Pretty near aft; towards the stern?

A. Yes.

Q. When you go below, where do you go?

A. I go through the engine-room and down a ladder.

Q. That is below decks? A. I am below decks.

Q. Did you see Mr. Driver down below decks at all? A. Mr. Driver is standing on top.

Q. He didn't go down below decks? A. No.

Q. At no time?

A. He had no business down there.

Q. He was not down there at any time, you say?

A. No, no time at all.

Q. Just tell us who the crew of the "Fearless" were on that day?

A. There was one deck-hand there, and Captain Sam—that is the only name I know him by.

Q. The captain?

A. The captain; myself; another deck-hand called Alf. Benson; he is not here; he is up in the country.

Q. Mr. Driver? A. The cook. [179]

Q. Mr. Driver? A. Mr. Driver.

Q. The deck-hand who testified, Kraatz?

A. Another fireman.

Q. Another fireman?

A. Gus Raymond; he was down below.

Q. Anybody else?

A. The first assistant; he was not there that day.

(Testimony of Charles F. Boster.)

sels then? How was the tug bearing to the steamer?

A. Right astern of her.

Q. Were you able to form any judgment as to the approximate length of line which the tug had out?

A. That I could not say.

Q. You could not say.

A. Not exactly, right to the length.

Q. What would be your best judgment?

A. In the neighborhood of 150 or 160 feet, stern to stern.

Q. What did you do while they were backing out of this slip?

A. I was just observing there, looking down the bay, that is all. [181]

Q. Did you see the tug when it let go of the steamer? A. Yes.

Q. Did you observe at that time the distance off the piers that the "Edith" was? A. Yes.

Q. What in your judgment was the distance it was off Pier 46, we will say?

A. I would say between 700 and 750 feet.

Q. What could you see, as you stood on the rock, that day?

A. I could see right down to Pier 26.

Q. Right down to Pier 26?

A. And quite a distance outside of it.

Q. Which side of the line from the position that you were at on Mission Rock to Pier 26 were the "Edith" and the "Fearless"?

A. Outside of the line.

Q. Outside of the line? A. Yes.

(Testimony of Charles F. Boster.)

Q. Was there anything inside of the line, from the position that you were in at Mission Rock to Pier 26 on that day? A. No.

Q. Did you after the "Fearless" let go the stern line—did you observe what she did?

A. Well, the first time I seen her after that was under the bow; I did not see her movements, other than she passed around to the starboard side.

Q. Did you observe what she did from that time on? A. Not closely.

Q. Did you observe the two vessels continuously up to the time the "Edith" went onto Pier 32?

A. I seen the vessel strike.

Q. You saw the vessel strike? A. Yes.

Q. What were you doing in the meantime? What were you doing between the time when you first saw the tug taking out the "Edith" until you saw her strike?

A. I was answering the telephone.

Q. Where was the telephone?

A. Situated around the corner of a house in a booth.

Q. When you came out of that, where were the vessels?

A. They had just parted the third line at the time.

Q. Parted the third line at that time?

A. Or at least parted [182] the head-line.

Q. From that time on, where were you—what were you doing?

A. Standing in about the same position as I first was standing.

(Testimony of Charles F. Boster.)

Q. What were you doing?

A. Waiting for a telephone call.

Q. From where?

A. From the company's office.

Q. Where was the company's office located?

A. Pier 15.

Q. During the time you were waiting, what were you looking at?

A. I was waiting for a steamer to come out from Pier 38 that I was going to assist into China Basin.

Q. Where is China Basin with respect to Mission Rock? A. Just beyond Pier 54.

Q. Is that what is marked "China Basin" on this plant? A. Yes.

Q. Where were you going to assist it into?

A. The vessel was coming out of 38 and going to 54.

Q. Did you observe the condition of the wind and tide that day?

A. Well, I know about what it was.

Q. What was it?

A. Strong southeasterly breeze, strong ebb tide.

Q. How does the ebb tide run with respect to the ends of the wharves?

A. It runs straight to the ends of the wharves.

Q. What do you mean by straight to the ends; parallel with the ends?

A. Parallel with the ends.

Q. Is there any distinction made in the towage business in San Francisco between towing a vessel and assisting a vessel? A. Yes.

(Testimony of Charles F. Boster.)

Q. Just what is it?

A. If you tow a vessel you are in full charge.

Q. And if you are assisting a vessel, what?

A. The master of the ship is in charge.

Q. When you are in charge of the vessel, where do you, as master of the tugboat, take your place?

A. Tie up to the vessel and go aboard of her.

Q. Tie up to the vessel and go aboard of her?

A. Yes. [183]

Q. From what vantage point do you navigate the two vessels?

A. From the bridge of the vessel.

Q. When you are simply assisting, what do you do?

A. Well, if you assist you stand by and have a line from the stern or bow, whichever the case may be.

Q. Where do you go in performing your service; do you go aboard the steamer, or remain aboard the tug?

A. Stay aboard the tug.

Q. Now, I will ask you whether or not, in your judgment, as a master of towboats, it would have been possible to have turned the "Edith" around that day after she had been pulled out of the slip between Piers 46 and 44 under the conditions of wind and tide, by the tug attempting to pull her stern to the tug's port, or to the "Edith's" starboard while the "Edith" went ahead under a starboard helm and attempted to swing her bow to port. Do you understand the question? A. I do.

Q. What is it?

(Testimony of Charles F. Boster.)

A. That it was impossible, under the weather conditions and tidal conditions.

Q. With the "Edith" drawing more water aft than she was forward, and with her light, being unladen, what is your judgment as to whether or not it would have been possible for the tug to have swung the stern of that steamer so as to have kept it toward, so to speak, her bow, and thereby make it possible for the steamer to have turned its bow against the wind and tide?

A. In my judgment it could not be done.

Q. It could not be done? A. No.

Q. What is the customary way of turning a vessel under conditions of tide and wind such as you had that day, when you want them to proceed against the wind and tide after they get out of the slip, as the "Edith" proposed to go that afternoon—how would you execute the maneuver customarily?

A. Put a line from the stern and pull him out of the slip, go around underneath the bow immediately and get another line and start him up. **[184]**

Q. When you get your line from the bow, how do you pull him?

A. Pull him right into the wind and tide.

Q. When you say "pull him into the wind and tide," you mean pulling the bow into the wind against the tide?

A. Pulling the bow into the wind against the tide.

Q. I will ask you whether or not there was anything to have prevented—was there any obstruction to have prevented—the "Edith" from dropping her

(Testimony of Charles F. Boster.)

anchors at the time that you saw the tug leave her stern and pass around to her bow?

A. There was nothing to prevent it, in my estimation.

Q. There was nothing to prevent it, in your estimation; was there any obstruction there in the waters that would make it impossible for her to drop her anchors? A. No.

Q. What can you say as to whether or not, in your judgment, there was room for her to have dropped her anchors at the time that you saw the tug at the bow of the "Edith"?

A. I should judge she had room enough to anchor.

Cross-examination.

Mr. SUTRO.—Q. How far away were you from Pier 44 when you stood there on Mission Rock. Look at that map, Captain, and see if you can get some assistance from the scale of it.

A. I see no scale here.

Mr. CAMPBELL.—600 feet to the inch.

Mr. SUTRO.—Just approximately. Will that ruler help you any, Captain?

A. This would be about 3000 feet.

Q. 3000 feet from where you were standing to Pier 46?

A. Not to Pier 46, no; that is to Pier 34. About 1800 feet.

Q. That would be about 3000 feet to Pier 34. Did you see the "Edith" drifting in distress?

A. I could not say in distress.

(Testimony of Charles F. Boster.)

Q. Did you see her drifting?

A. I seen her drifting.

Q. Did you see the direction she was drifting into?

A. I did. [185]

Q. Did you know what was sticking out?

A. What was sticking out?

Q. Into the bay there? A. I did.

Q. You knew that Pier 32 was considerably longer than these other piers? A. Yes.

Q. You said, Captain, that the "Edith" was about 750 feet out? A. Yes.

Q. And that you saw her drifting?

A. I saw her drifting, yes, for a little ways.

Q. She would drift right into the piers, wouldn't she? A. I wouldn't say so, no.

Q. If she was drifting straight, she surely would have drifted in, would she not?

A. You can't call that drifting straight in, can you?

Q. I am asking you. I want to get the facts. She was 750 feet out from the ends of the piers, as I understand you? A. Yes.

Q. She struck the pier inside of a couple of thousand feet?

The COURT.—The captain objects to the word "straight."

A. I don't see where you can get it straight.

Mr. SUTRO.—She was drifting in towards the piers?

A. If she was drifting straight in she would go in towards where she came out.

(Testimony of Charles F. Boster.)

Q. She was drifting in toward the piers, was she not? A. Toward the piers, yes.

Q. Wouldn't you consider that she was drifting in distress?

A. I would in one sense, and I would not in the other.

Q. Didn't it look to you that she was getting into trouble? A. No.

Q. You were able to calculate the distance between the tug and the "Edith," were you, from where you stood? A. Yes.

Q. You were not able to see she was drifting in towards Pier 32?

A. I couldn't say whether she was drifting in toward Pier 32, or not. **[186]**

Q. Did you see her drift as a matter of fact?

A. I did.

Q. You saw her drift toward the piers did you?

A. A little bit.

Q. A little bit? A. Yes.

Q. Enough to bring her 700 feet in didn't she?

A. Yes—not 700 feet in.

Q. Not 700 feet?

A. It would not bring her 700 feet in, because Pier 32 sticks out beyond the others 150 or 175 feet.

Q. She was 700 feet out from the short piers?

A. No; that would make her 700 feet out from Pier 44.

Q. I say she was 700 feet out from the shorter piers, not from the long piers; 46 and 32 are both long piers, aren't they? A. Yes.

(Testimony of Charles F. Boster.)

Q. She was 700 feet out from the shorter piers?

A. Yes.

Q. So she would drift in about 550 feet, if she was 750 feet out? A. Possibly.

Q. Did you make any effort to go to her assistance? A. No.

Q. Did it occur to you to do it at all? A. No.

Q. Do you know how far the "Edith" was from Pier 32 when the third line parted, the line that you talked about here? A. I could not say.

Q. Could you tell whether she was 200 feet out?

A. I could not.

Q. Could you tell whether she was 100 feet out?

A. No, I could not.

Q. She might have been only 50 feet out?

A. She was more than 50.

Q. But it might not have been more than 100?

A. From which pier, do you say?

Q. From 32? A. From 32.

Q. When the line parted?

A. I could not say.

Q. You could not tell?

A. I could not say; that is out of my line of vision, pier 32 was by the ship. [187]

Q. Where was the vessel when you saw the line part? A. In the neighborhood of Pier 36.

Q. Could you tell whether she was 200 feet out from Pier 36? A. I could not, no.

Q. You couldn't tell whether she was 100 feet out?

A. She was over 100 feet out.

Q. Somewhere between 100 and 150 feet?

(Testimony of Charles F. Boster.)

A. More than that. I would not stipulate exactly what it is.

Q. I do not want you to stipulate exactly, but I want to know what is your best estimate of how far she was out from Pier 36?

A. I could see part of Pier 32—a good 170 feet off —inside of it.

Q. Then you are judging by the fact that you could see this end of Pier 32, and the "Edith" was inside of your line of vision?

A. It was just closed by a little bit.

Q. She was inside of your line of vision?

Mr. CAMPBELL.—What do you mean by inside of line of vision?

Mr. SUTRO.—I mean she was inside there (illustrating).

A. I do not mean to say inside altogether. I say Pier 32 was just hidden by the vessel the end of it; maybe a few feet of it, the shed.

Q. Pier 32 is about 79 feet longer than Pier 34 and is 8 feet longer than Pier 36?

A. What pier, 32?

Q. According to this map Pier 32 is 805 feet and the other 618 feet? A. Yes about.

Q. 193 feet? A. Yes, I should say so.

Q. Longer than Pier 36? A. Yes.

Q. So you judge that the "Edith" was somewhere within 200 feet of Pier 36? A. About that point.

Q. What is the depth of water there?

A. I could not say.

Q. Where she was?

(Testimony of Charles F. Boster.)

A. I could not say; about 5 fathoms of water; six maybe. [188]

Q. 5 or 6 fathoms of water? A. Yes.

Q. What kind of a bottom is it? A. Mud.

Q. Soft mud? A. No; it varies.

Q. How much chain do you allow when you cast an anchor in a place like that with that depth and that kind of a bottom?

A. It depends what you are going to use the anchor for.

Q. To hold the ship.

A. 10 fathoms, 12 fathoms would do.

Q. 36 fathoms would do?

A. I did not say 36 fathoms.

Q. About 60 or 72 feet?

A. At the water's edge.

Q. At the water's edge? A. Yes.

Q. Then you have to add to that the depth of the water?

A. No; we are not adding anything to the depth of water at all; we are adding from the water to the hawse-pipe.

Q. How much do you allow?

A. 10 fathoms at the water's edge.

Q. Do you make any allowance for the tide?

A. No—that depends upon where you are anchoring.

Q. Right opposite Pier 36, where you say the "Edith" should have dropped her anchor.

A. I did not say she should have dropped her anchor at Pier 36; she had plenty of time all the way

(Testimony of Charles F. Boster.)

along until she got abreast of 40 and 38 to drop her anchor.

Q. It is your view that she should have dropped her anchor somewhere between the time that she was opposite Pier 44 and the time that the third line broke?

A. She had plenty of room between that space if she had wanted to drop it.

Q. Your idea is that she should have dropped the anchor before she ever got to Pier 38?

A. I didn't say she should have dropped it; I say she could have dropped it.

Q. But it is your idea, is it not, Captain, that there was hardly time enough for her to drop her anchor after she got down to where she was opposite Pier 36?

A. She could have dropped it there.

Q. Would not the tide have swung her around on that pier? [189]

A. On which pier do you mean?

Q. On 36. A. It may have, yes.

Q. The safest place for her to have dropped her anchor would have been somewhere between the position where she was opposite Pier 44 and the position that she got into opposite Pier 36? A. Yes.

Q. And if she was going to drop her anchor at all, or if you had been in charge and you were going to drop your anchor at all you would have done it some place between the position which I will mark "1" and the position which I will mark "2"?

A. Yes.

(Testimony of Charles F. Boster.)

Q. You understand that this position "2" is opposite Pier 36? A. Not quite opposite.

Q. It is supposed to be there? A. About 38.

Q. This is only an approximation, you understand, for the purpose of illustration. But after she got into that proximity over there to Pier 36, in the proximity of that, she was not in a good position to drop her anchor, was she?

A. That I could not say.

Q. Do you carry a 12-inch hawser on your tug?

A. No.

Q. Have you seen the 12-inch hawsers that were carried by some of your tugs, your company's tugs?

A. I have.

Q. Have you seen the one that the "Fearless" carries?

A. Well, I have seen some of the ones that she has carried, yes.

Q. They usually have an iron pennant on, haven't they? A. A wire?

Q. Yes. A. Yes.

Q. What is the size of that pennant?

A. That I cannot say.

Q. Approximately, in diameter? A. It varies.

Q. What is the thickest pennant you ever saw, in diameter?

A. An inch and three-quarters, an inch and a half, and an inch and a quarter.

Q. Somewhere around there. I am talking now about the diameter, not the circumference.

A. I am speaking about the diameter. [190]

Q. What is the length of these pennants?

(Testimony of Charles F. Boster.)

A. Well, that I could not say; they vary.

Q. They vary within what limits?

A. From 12 to 20, 25 fathoms.

Q. That is the pennant alone? A. Yes.

Q. There is no difficulty in a couple of men handling one of those pennants, is there?

A. Well, it takes more than a couple of men.

Q. How many would it take?

A. It would take three good men.

Q. Take three good men to handle a pennant?

A. Yes.

Q. What do you think one of those pennants weighs? A. That I could not say.

Q. How much per foot?

A. I could not judge that; I have never weighed them.

Q. It would not be over two pounds a foot, would it? A. That I could not say.

Q. Can't you give us any approximation?

A. I have never seen it weighed.

Q. Haven't you ever handled these pennants?

A. Yes.

Q. Have no idea of the weight of them?

A. I know they are heavy.

Q. Do you think a 12-fathom pennant—that would be 72 feet—would weigh 100 pounds?

A. Well, that I could not say.

Q. Somewhere around there?

A. Well, I don't know.

Q. But at any rate it would take three good men to handle one of those, you say?

(Testimony of Charles F. Boster.)

A. Not less than three.

Q. Not less than three; maybe more?

A. Maybe more, yes.

Q. Do you know how many men the "Fearless" had on board to handle the hawser and pennant they used there?

A. That I could not say.

Q. You know she had three, don't you?

A. I know she had three, yes, but she has got steam to heave it in with; they use steam.

Q. Now, you testified here, Captain, that it was not possible, on the 4th of March, 1916, for the "Edith" to come out of Pier 44, put her helm starboard so as to throw her bow to port bring her [191] stern around to starboard, and the tug at the same time keep on pulling the stern around. Is that always true, or is it true on that day because of the wind and tide?

A. I don't think it could be done under those conditions; it is a very ticklish job.

Q. Suppose you had flood tide, the tide running up in a contrary direction from that which it was running, and suppose instead of having a southeasterly wind you had a northwesterly wind; do you mean to tell me that it would not be possible to bring your vessel out of one of those slips and turn her bow with the wind and tide? A. How do you mean?

Q. If you had a flood tide and the wind blowing in the opposite direction from which it was blowing on that day, would it not be possible to bring a vessel out of one of those slips, if you were going to Hunt-

(Testimony of Charles F. Boster.)

er's Point, turn her bow with the wind and tide—could not you do that?

A. How do you mean with the wind and tide?

Q. Suppose the wind and tide were going in the opposite direction from what they were going on this day— A. Yes.

Q. Couldn't you turn the bow up towards Hunter's Point with that wind and tide?

The COURT.—Do you mean by this maneuver you are speaking of?

Mr. SUTRO.—The reverse of this maneuver.

The COURT.—By pulling around the stern?

Mr. SUTRO.—Bringing her out, pulling around her stern, and in the meantime have the captain throw the bow over.

The COURT.—That is an element you have been omitting from your question.

A. It might be possible to do it if you have got a man on the ship that understands the business thoroughly, and he will work the ship with your tug; otherwise it can't be done.

Mr. SUTRO.—Q. Suppose, Captain, you had a flood tide and the wind blowing in the opposite direction from that which it was blowing [192] on this day, so that it would be blowing up towards Hunter's Point, so that the tide would be running toward Hunter's Point, and you wanted to go toward Hunter's Point, and you brought that ship out from one of those slips, wouldn't it be perfectly feasible to put your helm to starboard, so as to throw your bow to port and have the tug pull your stern around at the

(Testimony of Charles F. Boster.)

same time? A. Not the way it is done.

Q. I say, would it be perfectly feasible to do it; in other words, to turn your bow with the wind and tide? A. I would not do it.

Q. Would it be feasible to do it, Captan?

A. It might and might not; I could not say that; I say I would not do it.

Q. Are there any conditions at all in the bay of San Francisco under which you could turn a vessel coming out of Pier 44 toward Hunter's Point by starboarding the helm? A. There is, yes.

Q. What conditions are those?

A. The wind right off the land.

Q. And the tide running, I suppose—

A. Slack tide.

Q. And a slack tide?

A. And maybe a little bit of ebb; it could not be very strong.

Q. Then the principal reason, really—isn't this a fact—that the principal reason why you think that the captain's way of trying to do this thing on that day was not possible, was because there was a strong ebb tide and strong southeast wind: Isn't that so?

A. Yes.

Q. In other words, you do not think when he came out of this slip he had any business to try to pivot his ship, if that is what he tried to do, in the face of that wind and tide. That is your view, is it not?

A. Yes.

Q. There might be conditions such as a slack tide

(Testimony of Charles F. Boster.)

and off-shore wind where he could do that: Isn't that so?

A. He could do that, as I said before, by taking a line over the stern first, and then receiving a line or getting a line to the tug over the bow afterwards [193] and—

Q. (Intg.) That is the way you would have done it; that is not my question. The captain, perhaps—I do not know, but the deposition discloses in this case that the captain backed out of that slip and tried to pivot his ship, that is, turn his helm to port, thinking that the tug would pull his stern to starboard. Now you think that that could not be done, do you? A. Not that day.

Q. I say, there are conditions under which that could be done, such as a slack tide and off-shore wind: Isn't that so?

A. An off-shore wind right off the land, yes, but not blowing right on.

Q. But I say, with a different wind and a different tide it could be done, couldn't it?

A. It might be; I couldn't say.

Q. You say that when you take full charge of a vessel you tie up and go aboard; do you mean by that you tie your tug right close up to the ship?

A. Yes, sir.

Q. Do you always do that when the vessel has no motive power of her own?

A. When the vessel has no motive power of her own we generally do that, yes, sir.

Q. Do you always do it? A. Not always.

(Testimony of Charles F. Boster.)

Q. Don't you frequently, for instance a vessel with her engine still for some reason or other, or a sailing vessel, perhaps, don't you frequently take a stern line from a vessel and tow her at her bow-line and tow her out? A. At times, yes, sir.

Q. When you do that your place is on the tug, is it not? A. Yes, sir.

Q. In other words, you are always on your tug unless the tug is lashed alongside the ship; Isn't that correct? A. Yes, sir.

Q. And if the tug is not lashed alongside the ship, then your place is on the tug; isn't that so?

A. Yes, sir.

Q. In other words, you never send your tug any distance from the [194] ship without being on it yourself?

A. I am always on it if it is away from the ship's side.

Q. You frequently take full charge of a tow when you are tied up alongside, don't you?

A. We do, yes, sir.

Q. So it is not a necessary test to say you are not tied up alongside; you may or may not be in full charge: Isn't that so?

A. Well, it depends on the job.

Q. Some jobs you are in full charge when you are tied up alongside and some jobs you are not in full charge when you are tied up alongside: Isn't that so? A. It all depends.

Q. I say, that is so, isn't it?

A. Yes, in some cases.

(Testimony of Charles F. Boster.)

Q. Did you see any barges off Pier 32 that would have obstructed any maneuvers of the tug and the "Edith" on that day?

A. There were some barges anchored off there.

Q. Did they obstruct your view? A. No, sir.

Q. Did you think they were in the way of the maneuvers these vessels were trying to make between 44 and 36?

A. They may have been if they tried to go around with the tug pulling the stern inshore.

Q. Where were those barges?

A. In the neghborhood of 34, or 32, or somewhere along there; I could not just say; they were in that neighborhood.

Q. How far in were they? A. Pretty close in.

Q. Pretty close in? A. Yes, sir.

Q. Could you see them from Mission Rock?

A. Yes, I seen them.

Q. From Mission Rock? A. Yes.

Q. Were they lying outside the "Edith" or inside the "Edith"?

A. There were some outside and one in about the line as she let go; they may have been a little bit outside, I could not say.

Q. Then the barges lay between the "Edith" and Pier 32, did they?

A. No, not between the "Edith" and Pier 32; I said [195] outside of Pier 32.

Q. Outside of Pier 32?

A. Yes. When the tug first let go of the "Edith"

(Testimony of Charles F. Boster.)

I could see the barge outside the stern of the "Edith."

Q. Then they would not be very much in the way of any maneuvers around 44 or 36 or 28 or 42, would they? A. No. They may have been.

Mr. SUTRO.—That is all, Captain.

Redirect Examination.

Mr. CAMPBELL.—Q. Captain, assuming that the "Edith" was only backed out of the slip so that her bow was only 30 or 40 feet off the end of Pier 44, and then she commenced to execute this maneuver of going ahead on her starboard helm and expecting to have the tug pull her stern to starboard, would it have been possible, under any circumstances, to have executed the maneuver with the steamer within that distance of Pier 44?

A. Utterly impossible under the circumstances.

Q. Would it have been possible in any way to have turned the steamer "Edith" when she was within the distance of 30 or 40 feet off Pier 44 so as to have headed her for Hunter's Point Drydock?

A. No, sir.

Q. Have you ever, in your experience in the tugboat business, seen a steamer attempt to turn within a distance of 30 or 40 feet off the end of the pier after she had backed out of it? A. No, sir.

Q. If the tug had let go of the stern line of the "Edith" at a time when the "Edith" was within 30 or 40 feet of the end of Pier 44, I ask you whether or not she ever would have drifted, with that wind and tide, down onto Pier 32?

(Testimony of Charles F. Boster.)

A. Do you mean and still keep backing?

Q. No, I mean dead in the water. If at the time the tug cast off the stern line the "Edith" had only been 30 or 40 feet off the end of Pier 44, I ask you whether or not she would have ever [196] drifted down onto Pier 32?

A. It would have been impossible.

Q. Have you ever removed a steamer from her pier, having charge of the operations, by remaining on your tug and having the tug *remove* from the side of the vessel? A. No, sir.

Q. When you have had charge of the towing operations and you remained on board your tug, and had your tug away from the side of the vessel, what kind of vessels were you moving?

A. We would consider them dead vessels, no steam and no power.

Q. When you have power on the vessel that you are moving, and you have charge of the operations, where do you take your station?

A. We generally tie up alongside, unless in the case of bad weather.

Mr. CAMPBELL.—I offer in evidence this plan of the waterfront. Have you any objection, Mr. Sutro, to this plan going in evidence?

Mr. SUTRO.—No objection.

(The document is here marked Claimant's Exhibit "B.")

Recross-examination.

Mr. SUTRO.—Q. Could you pull a vessel in this position shown here alongside of Pier 44 stern first

(Testimony of Charles F. Boster.)

straight out into the stream at right angles to the tide, or nearly right angles, and then put your tug into the wind and tide and hold her there until the vessel swung and then proceed against the wind and tide with her?

Mr. CAMPBELL.—Against it or with it.

A. I don't understand your question; you don't put it clearly enough.

Mr. SUTRO.—Q. I will try and put it again. If you pull the vessel out stern first and practically at right angles to the tide, or nearly so—

A. (Intg.) You didn't say "stern first" before.

Q. Well, you will excuse me for the omission, won't you? I say now "stern first," and then headed your tug into the wind and tide, holding the vessel there, wouldn't she swing so that [197] she could proceed under her own steam in the same direction you were headed?

A. In the same direction I was headed?

Q. I mean in the opposite direction you were headed.

A. Under favorable conditions, yes, it may be able to be done; I could not just say.

Mr. CAMPBELL.—I think you are confused again by your directions. Just repeat the question to him.

A. (Continuing.) I don't know what he is talking about.

Mr. CAMPBELL.—You listen and you will find out what he is talking about.

(Testimony of Charles F. Boster.)

A. (Continuing.) He don't know how to put a question.

Mr. SUTRO.—Q. Did you understand the question?

A. I didn't get it, I didn't get it clear enough.

Q. Wouldn't a perfectly feasible and proper way to perform this maneuver from the tugboat point of view be to do the following: Pull this vessel out stern first into the stream, head your tug into the wind and tide. Wouldn't the vessel then swing with the wind and tide and be able to make a complete turn and proceed under her own steam?

A. Not in all cases; it may be under some conditions; under others it would not be.

Q. I mean on this day, wouldn't it have been a perfectly proper and perhaps the best way from the tug's point of view, to take this vessel out and when she got out here clear of the pier, head your tug into the wind and tide so as to hold her stern and let her bow swing, and then let her go under her own steam up to Hunter's Point?

A. I would not tackle a job that way.

Q. You don't think that would be the right way to do it? A. No.

Q. Despite the fact that she would be going with the wind and tide if she did that?

A. She may not be able to turn there. The shipping that was anchored below would not allow her to turn [198] there that day.

Q. Wouldn't the tide carry her bow around and down?

(Testimony of Charles F. Boster.)

A. I am not speaking about the tide; you are speaking about making the turn there.

Q. Now, Captain, I might not make myself clear, but I think I do. A. I don't think you do.

Q. If your vessel came straight out of the slip and your tug held onto the stern, wouldn't the tide swing the vessel's bow with the tide in the opposite directions from the tug?

A. Well, it may and it may not.

Q. Do you mean to tell me that there is any question but what the tide would swing the bow of the vessel?

A. If the wind was in a different direction it would not.

Q. You know how the wind was on this day, don't you?

A. The wind was stronger than the tide, in my estimation.

Q. Wasn't the wind going very largely in the same direction as the tide?

A. Across it, almost diagonally across it.

Q. Just tell me without any possible case what the actual fact would have been on that day if that vessel had been pulled out from Pier 44, taking into consideration the tide and the wind as they were on that day, and she had been pulled out 700 feet, and the tug had held onto her stern, tell me whether her bow would or would not have swung around?

A. Her bow would have swung down stream.

Q. And then if the tug cast off, there would be nothing to prevent the vessel continuing on down

(Testimony of Charles F. Boster.)

stream and making her turn to starboard and going on up to Hunter's Point?

A. She may or may not.

Q. What would have been in the way? Wouldn't she have been going with the wind and the tide?

A. Yes, sir.

Q. Then, what would have been in the way?

A. You are asking me [199] one question and then trying to put two into it; I don't understand exactly what you want to get at.

Q. I think you understand perfectly, Captain.

Mr. CAMPBELL.—But you are asking a question, Mr. Sutro, and then immediately proposing an answer; you are confusing him.

Mr. SUTRO.—I don't think he is as confused as he is trying to be.

Q. What would have been in the way of the vessel proceeding, she having pointed this way with the wind and tide, and making a complete turn?

A. She may have been able to do it.

Q. What might have been in the way. You say something might have been in the way.

A. The shipping that was anchored down below may not have allowed her to do that.

Q. If she was out 700 feet from Pier 44 she had considerable sea room, did she not?

A. She may have had enough, and she may not have had enough; I could not say that.

Q. She could have got still more sea room by going further out? A. She may have.

Q. In other words, it would be perfectly feasible

(Testimony of Charles F. Boster.)

for her to make a starboard turn if she was out going with the wind and the tide?

A. A starboard turn?

Q. Yes.

A. What do you mean by a starboard turn?

The COURT.—Q. Well, let us call it a turn to starboard.

A. A turn to starboard, that is different.

Mr. SUTRO.—Q. It would have been perfectly feasible, would it not?

A. I don't know; it may have.

The COURT.—Q. What would have prevented it? Was the wind too strong, or was the tide too strong, or were both the wind and the tide too strong?

A. In that case the tide and the wind would have taken the vessel down on the shipping on that day.

Mr. SUTRO.—Q. So you say now, that having been turned in the [200] position I show here, with the bow toward the opposite direction from Hunter's Point, you mean to say she could not have gone with the wind and tide and made this kind of a turn, a turn to starboard, and proceeded down to Hunter's Point?

A. She may have been able to do it and she may not; I could not say whether she could, or not. I don't know. The conditions might have proved unfavorable.

Q. But you say that is not the proper way to do it? A. No, it is not.

Further Redirect Examination.

Mr. CAMPBELL.—Q. When you said that the

(Testimony of Charles F. Boster.)

wind was diagonally across the tide, how did you assume the tide was running?

A. Parallel to the ends of the docks.

Q. How does the southeast wind blow?

A. Pretty well on the docks.

Q. This way? A. Yes.

Q. It is not shown on this drawing, Captain, but where was the shipping you speak of?

A. There were a couple of barges anchored off Pier 32, and in that neghborhood,—maybe a little bit further up toward Pier 34; I could not say exactly where they were; I don't quite remember.

Q. If the steamer be swung as Mr. Sutro described, and attempting to make this turn, in making that turn would she be carried with the wind and the tide down along those piers?

A. Down toward the shipping; it would be a hard matter to turn a ship of that size under the conditions and the way the ship was flying light in a place of that kind; it would have been almost impossible in that space between 46 and 44, or wherever the vessel was lying there, to make that turn outside of those barges, because the ship, flying with the wind and the tide, and she don't steer very quick, she would not be able to make that turn, in my estimation; of course, somebody else may have been able to [201] do it.

Mr. SUTRO.—Q. She could have gone out to Fort Point before turning if she wanted to, couldn't she?

A. You asked me the question about turning above the shipping.

(Testimony of Charles F. Boster.)

Q. Oh, no. She could turn anywhere she pleased.

A. But you didn't ask me that. Why didn't you ask me that question?

Q. Because I am not quite as quick as you are.

The COURT.—You made a circle there and you confined him to that.

The WITNESS.—You made a circle there and I was going by that.

Mr. SUTRO.—Q. Make the circle as large as you please. Wouldn't it have been a simple thing to pull that ship out stern first and hold her there until the tide turned her and then let her go about her business, making the largest turn she needed to make, and then go up to Hunter's Point?

A. That I could not say. It depended on the captain of the ship, what he wanted to have done.

The COURT.—Q. You said in some part of your testimony that this was always a ticklish maneuver, or I think you used the word "operation," pulling it around by the stern: Just what do you mean by that?

A. What do you mean, sir—do you mean turning inshore?

Q. I want to know what you men; the language is yours. You were speaking of this operation, and you said it is always a ticklish operation; you were speaking of pulling a vessel around by the stern.

A. Well, if the man on the ship understands his business it is not a ticklish operation.

Q. Why is it a ticklish operation? What is liable to happen?

(Testimony of Charles F. Boster.)

A. The tug is liable to get into trouble, or the ship is liable to get into trouble.

Q. In what way? The word "trouble" is so general.

A. The tug may get in irons, but it very seldom happens. [202]

Q. Get in what?

A. Get in irons, the tug gets out of shape.

Q. Just what does that mean?

A. She gets so she can't pull no more.

Q. Any more at that particular time?

A. No, not at that particular time, any more than any other time.

Q. What puts a tug in irons? A. Carelessness.

Q. Then what happens to a tug when she gets in irons? A. She is finished, that is all.

Q. I know, but what particular injury is done to her?

A. She loses all power to do any more work; she is finished then.

Q. What is injured, her keel, her engine, or what?

A. No, but she is out of line, she cannot work any more, she has to let go the line.

Q. You mean on that particular job?

A. I don't mean for that particular job, I didn't say on that particular job.

Q. I don't know what you mean. What injury is liable to be done to a tug pulling a vessel around by her stern?

A. Well, if she don't keep in line she will get around this way and get alongside the ship; that is

(Testimony of Charles F. Boster.)

what in irons means, when the tug gets right flat alongside the ship after she starts to pull her out, she gets bow to bow, and she can't pull any more.

Q. She can't pull any more on that particular ship?

A. No. She can get out and get in shape again.

Q. I thought you meant the tug was injured forever. A. Oh, no.

Q. All that you mean is that she swings around in such a position that she cannot pull any more on that particular ship? A. On that particular line.

Q. Yes, on that particular line.

A. That is what I mean. **[203]**

Testimony of W. M. Randall, for Claimant.

W. M. RANDALL, called for the claimant, sworn.

Mr. CAMPBELL.—Q. What is your business, Captain?

A. Tugboat master; at present I am in the office as the assistant superintendent.

Q. Of the Shipowners & Merchants Tugboat Company? A. Yes, sir.

Q. How long have you been a tugboat captain in San Francisco Bay? A. 26 years.

Q. Were you in the employ of the company on March 4, 1916? A. Yes, sir.

Q. Did you see anything of the "Edith" and the "Fearless" on that afternoon? A. Yes.

Q. Were you on any tug? A. Yes, sir.

Q. What tug were you on?

A. The tug "Restless."

(Testimony of W. M. Randall.)

Q. Where were you and where were they?

A. We were going up the bay, going into 38, and I seen the "Fearless" and the "Edith" off of 44 or 46. I was coming in here for a vessel at the time.

Mr. SUTRO.—Q. Pointing to Pier 38?

A. Yes, and I seen them up here.

Q. Off of Pier 44? A. Yes, sir.

Mr. CAMPBELL.—Q. How far off of Pier 44, in your judgment, were they at the time that you saw them?

A. I should say from 750 to 900 feet, in that vicinity.

Q. What was the relative position of the steamer and tug at that time?

A. He was pulling her out on a stern line, but with very little sternway at that time.

Q. What did you do with your tug?

A. We went into Pier 38, into a Japanese steamer.

Q. What was the next you saw of the "Fearless" and the "Edith"?

A. He was down a little below this diagram, I should say.

Q. Opposite what pier?

A. About right here. I was in at 38, and [204] as I looked out he was right here.

Q. On which side of Pier 38 were you?

A. On the north side.

Q. You were in there for what purpose?

A. To take out a Japanese steamer.

Q. Where were you going to take her?

A. To 54.

(Testimony of W. M. Randall.)

Q. Was any other tug going to assist you with that steamer?

A. There was another tug coming to assist me, yes, sir.

Q. Do you know where that tug was at the time?

A. I didn't know at the time but I afterwards found she was at Mission Rock and was going to assist me when I got there.

Q. How far was the "Edith" and the "Fearless" off Pier 38 or Pier 36 at the time that you saw her in that vicinity?

A. I don't think this is a good diagram of—

Q. I didn't ask you that. I asked you, in your judgment about how far were they off the pier?

A. Oh, I presume 250 or 300 feet off of here.

Q. Which pier? A. Pier 38.

Q. What were the relative positions of the tug and steamer at that time, when they were opposite Pier 38?

A. The tug was directly under her starboard bow.

Q. What was the last that you saw of them?

A. That was just it, just about the last I seen them; they either drifted down or got out of my line of vision.

Q. What did you do then?

A. I went to work on my job, to take the ship out.

Q. Now, Captain, I ask you whether or not, in your judgment, it would have been possible for the steamer "Edith," on being pulled out of the slip between Piers 46 and 44, to have turned and proceeded under a starboard helm against the wind and tide so

(Testimony of W. M. Randall.)

as to proceed to Hunter's Point Drydock if the "Fearless" had pulled the stern of the "Edith" to starboard by the tug starboarding **[205]** her helm?

A. Not at 700 or 800 feet off the dock; possibly about a mile away they might have done it, or half a mile away.

Q. Why do you say it could not have been done at 700 or 800 feet?

A. Too much drift, too much current down towards the dock; in other words, too much leeway.

Q. What would have happened, in your judgment, if that maneuver had been attempted, what would have happened to the two vessels?

A. Well, they would have went broadsides on the dock.

Q. What would have carried them broadside on the dock? A. The tidal condition and wind.

Q. How was the wind setting that day with respect to the docks?

A. Very much on the dock, but not broadside.

Q. And how was the tide running?

A. About parallel with the docks, running right straight down the end, or thereabouts—it varies a little.

Q. What is the custom, Captain, in the port of San Francisco, with respect to a tug assisting and a tug taking charge of a towing operation, what is the difference in those two operations, according to the custom in the port of San Francisco?

A. In assisting, we generally consult with the cap-

(Testimony of W. M. Randall.)

tain or the pilot who is in charge of the vessel as to what they want us to do, and if they want us to take charge, we do so.

Q. What is the difference between the two operations, when you take charge and when you assist?

A. That is just about it; many times we consult, most of the times we do consult—always do so far as that is concerned.

Q. That does not explain anything to me. What do you do when you take charge of the operation?

A. We tell them what to do.

Q. Tell who what to do?

A. The captain, and the mates, etc., as to what we want done.

Q. And where do you take your station?

A. If we are alongside, on the bridge—if we are fast to them. **[206]**

Q. Have you ever taken charge of the undocking of steamers from San Francisco wharves without being on the bridge, if they have no steam?

A. Oh, yes.

Q. When the steamers have no steam, and you take charge of the undocking operations, and you don't have your tugboat alongside, how do you handle it?

A. On a line, and talking with the men on the ship, telling them what to do, and so forth.

Q. And where would you remain under those conditions? A. On the tugboat.

Q. In the assisting operation, what do you do, what is the difference between the two, what do you

(Testimony of W. M. Randall.)

do when you go to assist?

A. We usually look the job over and consult with the captain about the best way to do it.

Q. Do you make any distinction between assisting and taking charge? A. Oh, yes.

Q. What is it?

A. If we are taking charge, and he has no steam, we usually take it more upon ourselves; if we are assisting, we consult with him.

Q. In an assisting operation, who is the managing head, the tugboat captain or the ship captain?

A. The master of the ship.

Mr. SUTRO.—Just a moment. I submit that he stated the facts and the conclusion will be drawn by the Court. I object to the question.

The COURT.—I would just as soon have his view of it, anyway. The answer will stand.

Mr. CAMPBELL.—Q. Who is the managing head in an assisting operation, who is the man in supreme command in an assisting operation?

A. The captain—the master of the vessel.

Q. Did you observe on that day as to whether or not there were any barges anchored in the vicinity of Pier 32?

A. No, I didn't notice that, although it used to be quite the custom for a barge [207] to be there—

Mr. SUTRO.—Just a minute: I object to that. He said he did not see any barges there.

The COURT.—Let that go out.

Mr. CAMPBELL.—That is all.

(Testimony of W. M. Randall.)

Cross-examination.

Mr. SUTRO.—Q. When you assist you say the master is in command? A. Yes, sir.

Q. His is what they call the dominant mind?

A. If you call it that.

Q. He gives the orders?

A. In very many cases.

Q. Always?

A. There are some exceptions to that, but usually it is the master of the ship. We would go and say to the master what he thought about doing so and so.

Q. You would sort of talk it over with him?

A. Yes, sometimes.

Q. Consult with him as to how it should be done?

A. Well, they a good deal rely on our judgment, of course.

Q. They rely a good deal on the judgment of the towboat man?

A. Oh, yes, a great many of them do.

Q. And the towboat man uses his own judgment as to when to cast off and when not to cast off?

A. On a great many occasions, but usually it is between them; they understand when it is going to occur, he would not cast off and the man going astern with his propeller, he would keep hold of him until he was stopped. That is what he would do.

Q. And then he would use his own judgment as to when he would cast off?

A. Oh, yes. Many times we would object to casting off if we thought there was going to be any immediate danger.

(Testimony of W. M. Randall.)

Q. You would call out, or something of that sort?

A. Yes, we would try to protect the ship.

Q. You say that this movement of turning a vessel by a starboard **[208]** helm, having the tug pull the stern to starboard, could not be done 700 or 800 feet away from the dock?

A. No, sir, not under those conditions.

Q. Not under the weather conditions on that day?

A. No.

Q. You would think that was an ill-advised attempt if it was attempted, in view of the tide and the wind? A. Yes, sir.

Q. Of course, if the man did not pay any attention to the tide and the wind, or if they were not being considered, or if he was not familiar with them, there would be no objection to it then, would there? Eliminating tide and wind, there would be no objection to it, would there?

A. You mean slack water and no wind?

Q. Yes.

A. That is possible; but you have to work very much together on that, and—

Q. You—

Mr. CAMPBELL.—Let him finish his answer; you interrupted him.

Mr. SUTRO.—He finished his answer.

Q. You say it could have been done half a mile or a mile away?

A. On that particular day, yes; half a mile away if a man started he might finish it; I should not think any man would do it, though.

(Testimony of W. M. Randall.)

Q. Which leads me to ask you if it is not a fact that the objection to that maneuver is one based largely on conditions; there are conditions when it can be done and conditions when it cannot be done?

A. Close to the dock is the principal condition you have to consider.

Q. And the tide and the wind?

A. Tide and wind would be the second condition.

Q. You say that when you last saw the tug and the "Edith" the tug was right under the "Edith's" bow? A. Yes, sir. **[209]**

Q. And then they started to drift?

A. They were both drifting; he had not the line out.

Q. He had not the line out?

A. No; they were both drifting then.

Q. And they were from 250 to 300 feet off Pier 38?

A. I think safely about that much.

Q. And still drifting in toward the piers?

A. I should think so from the wind; the direction of the wind should drift them in.

Q. About how much water is there there, Captain?

A. I should say roughly speaking there should be 6 or 7 fathoms of water there.

Q. How much chain do you allow when you drop an anchor in water of that depth, taking into consideration the tide and the wind that is running?

A. If we were going to moor the ship there and she was going to stay there for any length of time, we would give her lots of chain; if we were only going to temporarily swing her on an anchor, probably

(Testimony of W. M. Randall.)

15 fathoms outside of the hawse pipe would keep her there.

Q. She would drag a little, would she not, with that wind and tide? A. More than likely.

Q. She would drag, would she not?

A. Yes, a trifle.

Q. And then her stern would swing around toward the docks? A. Yes, sir.

Q. She couldn't do that unless she was a sufficient distance off from the docks? A. No.

Q. She could have done that, in your opinion, when she was out here at Pier 44?

A. Anywhere down here—

Q. But when she was coming close—

A. (Continuing.) She could have done it then.

Q. How far out would she have to be?

A. At 200 or 250 feet he could have done it if he wanted to, but I don't know what the result would be afterwards.

Q. He could have swung her onto the piers if he wanted to? **[210]** A. Possibly, or possibly not.

Q. The proper place to drop the anchor, if he was going to drop it, would be near Pier 44, between 44 and 38?

A. If he had been disabled, yes.

Q. Assuming now, Captain, that his line was foul, or he thought it was foul, and the tug did nothing, so that he was going to drop his anchor, the proper place to drop it would be somewhere in those positions betwen 44 and 38? A. Oh, yes.

(Testimony of W. M. Randall.)

Q. And not wait until he got too close to the docks? A. Surely.

Q. Have you any of those wire pennants on any hawsers that you have? A. Yes, sir.

Q. And you know, as a matter of fact, that they run about the length of the one that was on the "Fearless," usually about 15 fathoms?

A. I guess usually 15 to 25.

Q. The pennant itself? A. Yes.

Q. And that would be about from 90 to 150 feet; so that if the vessel was about 50 feet above the bow of the tug, one of those pennants could be passed up, it would be long enough, would it not? A. Oh, yes.

Q. Do you know what the weight of one of those pennants is? A. No.

Q. Do you know the diameter? It has been testified here that it is about an inch and a half or an inch and three quarters. A. Yes, just about that.

Q. They weigh about two pounds to the foot, don't they, or one and three-quarters?

A. I should think about two pounds or two and a half; they are quite heavy; some of them are solid and some of them have a rope heart in them. That would make a little difference in the weight.

Q. The solid ones weigh about one and three-quarters pounds to the foot?

A. They should weigh more than the others. [211]

Q. They would weigh about 1¾ pounds to the foot, wouldn't they?

A. I don't say that, I am not sure of it.

(Testimony of W. M. Randall.)

Q. How many men do you think it would take to handle 50 feet of one of those wire pennants?

A. In what way do you mean?

Q. To haul it from the tug up the bow of the ship —a couple of men?

A. It would depend on your time; you could do it with one man if you had plenty of time; in a hurry-up job, you would want three or four men.

Q. But suppose you had two or three minutes to haul it up a distance of 30 or 40 feet, a couple of men could do it couldn't they?

A. In two or three minutes, you say?

Q. Yes.

A. Well, they could probably do it, but I would rather have three or four men to do it in two or three minutes.

Q. If you had three or four men on the stern of the tug— A. Oh, they have nothing to do with it.

Q. But they could pass it up.

A. They have nothing to do with it.

Q. Well, they can lift it up, can't they?

A. They simply put it out and see that it keeps clear of their wheel; they can't lift it.

Q. No, they can't throw it up, I know that, but they can clear it and help these fellows get it up, can't they?

A. Yes, if you can get it up without its kinking up, and so forth.

Q. A couple of men on the deck of the ship could handle it, couldn't they?

A. I don't think two men would get it up in two

(Testimony of W. M. Randall.)

or three minutes, because after you get it up to the deck of the ship you have to pull it back some little way to lay it; they couldn't do it.

Q. They couldn't lift 100 pounds?

A. Oh, they could lift it, but they have to do more than that, they have to do more than that.

Q. What else do they have to do?

A. They have to haul it back. **[212]** to where the bitt is.

Q. But if there are more men aft they could help them do that, couldn't they?

A. Oh, yes, the more men you have the better and the quicker you can do it.

Q. Do you buy this kind of stuff? Do you have anything to do with that in your capacity as assistant superintendent? A. No, very little.

Q. You have something to do with it, haven't you?

A. Not with the buying.

Mr. SUTRO.—That is all.

Mr. CAMPBELL.—That is all.

The COURT.—Q. Who determines whether you take charge or whether you assist, and when is that determined?

A. In the office they usually say to you to go out and assist such and such a vessel into the stream; if it is a flat tow, as we call it, they say, "Such a steamer has no steam, and you put her to the dock."

Q. That is determined in your own office?

A. Yes, usually we get directions in the office.

Q. And the directions are given to the masters?

A. Yes, we tell the masters which is which.

Testimony of W. J. Gray, for Claimant.

W. J. GRAY, called for the claimant, sworn.

Mr. CAMPBELL.—Q. Captain, do you hold a master's certificate? A. Yes, sir.

Q. For how many years have you held one, or, rather, since what year have you held one?

A. Since 1874.

Q. During that time, in what business have you been engaged? A. Tugboat business entirely.

Q. Where? A. San Francisco.

Q. What has been your position?

A. Master for 12 years, and, [213] superintendent the rest of the time—manager.

Q. Who was the manager of the Shipowners and Merchants Tugboat Company on March 4, 1916, at the time of the accident to the "Edith"?

A. I was.

Q. Who is the manager now? A. I am.

Q. Is there any difference in the port of San Francisco between assisting and being in charge of a towing operation with your company?

A. Yes, sir, there is a great deal of difference, both as to charges and as to orders.

Q. Explain to the Court what that difference is?

Mr. SUTRO.—I have assumed, in not objecting to expert testimony along this line, that some witness that will be produced that will testify that the captain of this tug was assisting and not towing.

Mr. CAMPBELL.—Yes, we will prove that. Our captain has not reached port yet.

Mr. SUTRO.—You expect to put the Captain on?

(Testimony of W. J. Gray.)

Mr. CAMPBELL.—I do, yes, as soon as he reaches port.

Mr. SUTRO.—Then this is merely a matter of order of proof.

A. When we are engaged to assist a vessel out we give orders to the tug to go and assist that vessel from the dock; if it is a flat tow, we give them orders, we give them instructions how to do it, even to our old hands. The same way with an assist, we tell them what to do.

Q. For instance, in this particular towage, what was the towage rate on the "Edith" for assisting from Pier 46 to Hunter's Drydock?

A. I could not give that off-hand, but the difference would be less than half for assisting.

Q. Less than one-half of what?

A. Of the tow between the city and Hunter's Point. I could not give it off-hand. We have a regular printed rate. It is less than half—not over half, and [214] very likely less than half.

Q. Less than half the rate for a flat tow?

A. For a flat tow, yes.

Q. In a flat tow, what does the master of the tug do, what is his function?

A. He takes full charge of all operations connected with the transfer of that vessel from one point to the point he is going to.

Q. How does his supremacy of command compare with that of the master of the steamer, so far as that operation is concerned? A. Exactly the same.

Q. Are the two of equal command, then?

(Testimony of W. J. Gray.)

A. We take full charge if we tow the vessel; if we assist, the captain of the ship takes full charge.

Q. And in the assisting, where does the tug captain remain? A. He remains on his tug.

Q. And in the flat tow, where will he be?

A. He is on the bridge or the deck of the vessel; if the vessel has a bridge, he is on the bridge.

Q. Is there any difference in the custom here as to the use of lines in an assisting service and a towage service?

A. Yes. If a man wants the tug's hawser he engages for it and pays for it; but is is customary to take the vessel's lines in assisting work.

Q. Under what circumstances does the tug furnish the towing hawser? Under what conditions do you furnish the towing hawser?

A. When it is engaged for and when we go to sea, or to Port Costa.

Q. What do you mean by that?

A. When they engage the tug's service, they say "We want the tug's hawser."

Q. Is there any extra charge made for the use of the hawser? A. Yes; I told you that.

Q. What is the extra charge made?

A. That ranges from $5 to $25; it depends on the service. Going to sea with a sailing [215] ship it costs $25; short moves around the waterfront $5.

Q. In an assisting service, however, such as docking or undocking steamers at the San Francisco wharves, what is the custom as to who supplies the towing-line?

(Testimony of W. J. Gray.)

A. As a general proposition in assisting the ship supplies the lines. There are exceptions to that, as I say, when we charge for it. For instance, the "Northern Pacific" and the "Great Northern," when we tow them to the dock they always furnish the line; when we take them away from the dock we furnish the line.

The COURT.—Q. Is that by agreement?

A. Yes, sir.

Mr. CAMPBELL.—Q. In assisting, do you ever furnish the towing line to the steamer, without special arrangements therefor being made in advance?

A. They always have to make special arrangements where we furnish a vessel with a line; there is a charge also.

Q. Now, Captain, you saw nothing of this accident? A. No.

Q. Assume that the steamer "Edith" was pulled out from the southerly side of Pier 44 by the "Fearless," until she was in a position we will say approximately 700 feet off the end of Pier 44, or we will say sagging down toward Pier 42; I will ask you whether it would have been possible, in your judgment, for the steamer "Edith" to have been turned in her course to port so as to head toward Hunter's Point by starboarding her helm and going ahead on her propeller, and by the tug starboarding its helm and attempting to pull the stern toward the "Edith's" starboard, with the wind blowing southeast that day strong, and the tide running in?

(Testimony of W. J. Gray.)

A. It would have been impossible.

Q. Why?

A. If the ship had been on an even keel, and we had plenty of room, it is possible we could have done it. In this case the ship drew 8 feet foreward and 12 feet aft, and the effect of the wind on her bow would have kept her off, so we could not have got [216] that bow to the windward. The strong wind would pay the bow off quicker than we could pull on the stern, the bow would drift faster than the stern, because of drawing less water, and we could not overcome that drift.

Q. What, in your judgment, would have been the proper operation to pull that steamer out of that slip and to swing her bow in her course so as to head her for Hunter's Point, with the wind southeast and the tide ebb?

A. Swing her with the tug, or with her own wheel.

Q. With the tug what would have been the proper operation?

A. You could have taken her out the way this was done, or you could have taken her out and let her go down the front and swing herself around.

Q. When you say "as this was done," what do you mean?

The COURT.—As this was attempted.

A. Yes, as this was attempted. There was no trouble about handling that ship at all. Just haul her out and give her the line back and then slip under her bow and haul her off; in the meantime he

(Testimony of W. J. Gray.)

will use his propeller to keep himself from drifting in.

Q. From drifting in toward what piers?

A. In toward the piers.

Q. How would he use the propeller?

A. Backing.

Q. If he had attempted the other maneuver, by going down along the front—what do you mean by that?

A. He could have hauled him out and hauled him astern to the wind and tide, then you could cast her off and the ship could have moved down inside—there was a barge lying there, he could have gone down inside of that, and he could have made his turn at the ferries, when he got down to Howard street, or below Market street. It could have been done that way. It would have taken longer—that is all.

Q. If the "Edith" when she was in a position approximately 700 feet off the end of Pier 44 or Pier 42, had fouled her propeller [217] with the line so the propeller could not have been used, what, in your judgment, would have been good seamanship for her to have done at that time?

A. Anchor until I cleared my wheel, but I would never be satisfied until the engine stopped, I would keep that wheel going until she stopped. The mere fact of a line in the wheel don't stop the wheel. We sometimes make a trip to Port Costa with a line in our wheel.

Cross-examination.

Mr. SUTRO.—Q. Captain Gray, what is your

(Testimony of W. J. Gray.)

position with the company that you mentioned here?

A. Manager.

Q. Will you state again what the name of that company is?

A. Shipowners & Merchants Tugboat Company.

Q. That is the claimant here, is it not, the owner of the tug "Fearless"? A. The owner, yes, sir.

Q. Without going into any detail about the matter, you are personally interested in the Merchants & Shipowners Tugboat Company—if that is the name?

A. Very slightly, outside of the salary proposition.

Q. Your principal interest in the company is by reason of your position? A. Yes, sir.

Q. And you are the operating head of the concern, aren't you? A. Yes.

Q. Are you also a stockholder?

A. A very small one.

Q. As I understand you, Captain, it would have been a perfectly proper thing to have taken the "Edith" stern first out of this dock and then let her bow swing with the wind and tide and then let her go under her own steam, she having cast off the tug, and make such turn as the shipping permitted, always going with the wind and tide and then turning to port and going on up to Hunter's Point?

A. That could have been done.

Q. It would have been a perfectly proper way to do? [218]

A. It could have been done. All the difference is it would have taken longer and more time because

(Testimony of W. J. Gray.)

you had to gather headway with the current and wind.

Q. It would have taken longer?

A. Very much longer.

Q. It would have been a safer maneuver than the other? A. No, sir, no safer.

Q. No safer?

A. No, sir, but it would have been safe, but it would have taken a considerably longer time, that is all.

Q. The maneuver that was attempted involved the casting off of the stern line and running around to the bow and picking up another line, didn't it?

A. No, sir.

Q. Did not the maneuver that was attempted involve the tug casting off the stern line?

A. Yes, casting the stern line off. I am talking of—

Q. Just answer the question, if you will please, Captain and we will get along much faster. And did not the maneuver also involve the tug going around the starboard bow of the "Edith"?

A. No, sir.

Q. It also involved the taking of a line from the starboard bow?

A. Not necessarily; they could take a line from either bow.

Q. It involved the dropping of the line and the tug making a turn and going to the bow of the "Edith," didn't it? A. No, sir.

Q. Do you think that the maneuver that was attempted on that day, namely, to tow the "Edith" out

(Testimony of W. J. Gray.)

stern first, drop the line, go to her bow and take her bow-line and turn her into the tide and wind was a proper maneuver? A. Yes, sir.

Q. Didn't that maneuver involve dropping the stern line and taking the bow-line? A. Yes, sir.

Q. Didn't it also involve the tug coming from the stern of the "Edith" to the bow of the "Edith"?

A. You see, you don't quite grasp it. The proper thing for the ship to have done was **[219]** to keep on backing after he got his line, and let the tug stay right where she was and when the ship's bow got opposite the tug he could have swung a line around and turned her right around; it would have saved all the time and trouble of the tug making that switch around; he was headed just about right, pretty close to right. All the ship would have to do would be to continue her stern board until the bow was equal to the tug and then slip the line on and away she would go.

Q. The tug would have remained stationery?

A. Practically so.

Q. The ebb tide and the wind would not have affected the tug's position?

A. It has a slight effect; the tide has the same effect on both hulls, the wind has a little more effect on the lightship than the tug.

Q. But you don't think it would have been necessary for the tug to turn her engines at all for this maneuver?

A. Oh, yes, I would have the tug so I could turn her back or ahead, just as was necessary.

(Testimony of W. J. Gray.)

Q. I asked you if the tug did not have to go to the bow of the "Edith" for this maneuver, Captain, and I will ask you that again.

A. And I will explain to you that the ship could have continued on astern and when her bow got opposite the tug's stern she could have passed the line to her. That is the quickest way.

Q. Then it is your view that the proper thing to do was to cast off the 200 feet of line and keep the ship's wheel going astern so that she would get opposite the tug and the tug would not drift very much but would be near the ship's bow?

A. I told you that the first thing you do is to cast the line off and then haul it in and keep the ship going astern.

Q. Would you have the wheel turning astern while it was being hauled in? A. No, sir. [220]

Q. It would foul, wouldn't it?

A. It might foul.

Q. It would not be very good seamanship to keep the wheel turning while the line was being hauled in, would it?

A. Not if it trailed under it; if it trailed to one side, it would be all right.

Q. You know where the captain stands, don't you?

A. Yes, and I know he has a pair of eyes to look forward and aft.

Q. He is on the bridge, isn't he?

A. Yes, and the second mate furnishes the eyes aft.

Q. He stands up on the bridge, doesn't he?

(Testimony of W. J. Gray.)

A. Yes.

Q. And when he is told that 200 feet of line has been cast off his stern, proper seamanship requires that he should stop his engines, does it not?

A. Yes, sir.

Q. You would not stand on the bridge of a vessel and keep your propeller turning if you were told there was a stern line 200 feet in length hanging over your stern, would you?

A. If I was drifting into the dock I would find out whether it was, or not; I will not stop my engine when my ship is going into the dock or on the rocks; I will keep it going back.

Q. If you can just forget, Captain, that you are a partisan, or an interested witness, we will get along so much faster. I want to treat you as respectfully as I can.

Mr. CAMPBELL.—I don't think he is deserving of any lecture.

Mr. SUTRO.—Will you please repeat the question, Mr. Reporter?

(Question read by the reporter.)

A. I say no. I would stop the propeller while I was getting that line in.

Q. The maneuver, which I first asked you about, you described as perfectly safe, pull him out, turn him around with the tide and wind and let him make his big turn; you said that was safe.

A. I didn't understand the question, turning around with tide and wind; I would turn him up against the tide and the wind, turn [221] his

(Testimony of W. J. Gray.)

stern up against the tide and the wind, and then let him go with the tide and the wind and when he gets headway enough port his wheel and make the turn. That can be done, but it takes a longer time.

Q. But it is safe? A. Yes, it is safe.

Q. That is, this movement coming around like this?

A. Yes, as long as you give him room enough to start.

Q. You think that other movement we have been talking about is safe?

A. Just as safe, and very much quicker.

Q. Do you think the first movement I referred to just now could have been performed in this case?

A. Are you alluding to his hauling the stern up to the tide and wind?

Q. Yes. A. Yes, sir.

Q. It could have been performed safely?

A. Yes, sir.

Q. Was this particular maneuver performed with success? That admits of an answer "Yes" or "No."

A. Was it performed with success?

Q. Yes.

A. No sir, it takes two to perform either of these movements.

Q. You have answered the question, Captain, and your counsel will ask you further questions if he thinks the testimony requires an explanation.

A. Bear in mind that the other one was not safe unless the captain of the ship performed his duty.

(Testimony of W. J. Gray.)

Mr. SUTRO.—I move to strike that out, your Honor.

The COURT.—Let it go out.

Mr. SUTRO.—Q. Captain you made considerable investigation into this case, didn't you, at the time the occurrence was first brought to your attention?

A. I always investigate cases very thoroughly.

Q. That is one of the things you attend to is it?

A. Yes, sir.

Q. And you verified the answer in this case?

A. I suppose so. [222] It is so long ago I would not want to say.

Q. It is quite a time ago. Captain, you may assume that this is a correct copy; if Mr. Campbell says it is you will accept it as such, won't you?

A. Yes.

Q. Now, you are satisfied, are you not, from your investigation of this matter, and you admit that as soon as the tow-line was cast off the tug "Fearless" a signal was given to the master of the steamship "Edith"? A. No, sir.

Q. I will read you what you say. Is it or is it not the fact that' "Claimant admits that a signal was at once given to the master of the steamship "Edith" by the mate of said steamship who was standing on the poop-deck, that the tow-line had been cast off by the master of the tug "Fearless"?"

A. Yes, sir. We notified—

Q. That is all, Captain.

A. You don't want me to explain?

(Testimony of W. J. Gray.)

Q. No. You can explain if your counsel thinks it is necessary.

Q. Are you familiar, Captain, with the 12-inch hawser that was on the "Fearless"? A. Yes, sir.

Q. You have seen that line?

A. Oh, no doubt, I must have seen it.

Q. Has that line attached to it what is called a wire pennant? A. Yes, sir.

Q. What is the length of that pennant?

A. They range about from 20 to 25 fathoms on big boats and 15 on small ones.

Q. Who did you buy these pennants from?

A. From different people.

Q. Do you happen to remember who you bought this pennant from?

A. No. We buy them by the coil.

Q. Did you get it from Macomber & White?

A. We got them from the American Steel & Wire Company. I think we bought three or four coils. [223]

Q. Can you ascertain for me, Captain, just who you bought this pennant from that is on the tug "Fearless" and what its size and weight is?

A. I think I can.

Q. You can ascertain the size and weight of it, anyhow, can't you?

A. We can get the size and the weight.

Q. And will you do that for me?

A. I will. I am not yet sure whether we can trace who we bought it from. There are three different firms we buy the wire from.

(Testimony of W. J. Gray.)

Q. If you will give me the size and the weight, that will do. I was merely going to refer to the catalogue, if I had the name, to see the size and weight. And can you also get me the length of it?

A. The chances are that pennant has been condemned; I am not sure about that. Anyway, we have a standard length.

Q. You heard the testimony here in court to-day, didn't you? A. Yes, sir.

Q. Would you say that that hawser was suitable for the purpose of towing operations?

A. Yes, sir.

Q. It was? A. Yes, sir.

Q. And the only reason it was not passed out was that it was too heavy: Is that the idea?

A. The only reason it was not passed out is that it was not engaged for.

Q. It was not engaged for?

A. No. If it had been engaged for the captain of the tug would have had orders to furnish the hawser.

Q. And then he would have furnished it?

A. Yes, sir.

Q. But the reason he did not furnish it was that the "Edith" had not engaged it and he had no right to furnish it?

A. He had no right to volunteer the hawser.

Q. In other words, when the first officer of the "Edith" called for the hawser, he was calling for something that the captain had not engaged for?

A. I didn't understand he called for it until the last moment. He passed out his own lines twice;

(Testimony of W. J. Gray.)

the third time I [224] understand he called for it. It was impossible for them to get that hawser up onto that forecastle in the time required.

Q. It was too heavy?

A. It was too heavy to get up there.

Q. Then you would say it was not suitable for this operation?

A. Yes, it was suitable for that operation, but we were working under conditions.

Q. Was it suitable for the purpose of performing the maneuver for which this tug was engaged?

A. Yes, but understand the hawser was not engaged for.

Q. I understand that. But it was suitable for the purpose of performing the maneuver for which this tug was engaged?

A. It was suitable to perform any movement.

Q. You heard the testimony this morning of Mr. Driver when I asked him that question and he said that this hawser was absolutely suitable for the performance of that maneuver that was attempted when the tug asked for a hawser off the starboard bow of the "Edith." He said it was a suitable hawser; is that your view of it?

A. Yes, if you furnish the suitable number of men to handle it. If you furnish two men to handle it, no, it is not suitable.

Q. Now, Captain, won't you just try and answer my questions and we will get along so much faster.

A. My dear sir, your questions have to have an explanation to make them intelligent.

(Testimony of W. J. Gray.)

Q. Either the questions or the answers, Captain, but your counsel will call for those explanations if he deems them necessary. I am not trying to lecture you, but we will get along so much faster if you answer my questions. I must ask you again if this hawser was a towing line suitable for the purpose of performing the maneuver which this tug attempted?

A. Yes, sir.

Q. Now, I want to read you the allegations of your answer in that connection, and ask you if you so stated, and if it is true, or not: [225]

"Claimant does admit that the first officer of said steamship asked said tug to pass a large 12-inch hawser lying on the stern of said tug, but that said hawser was so heavy that the men on the forecastle-head of said "Edith" would not have been able to have taken said hawser aboard, and it would not have been practicable to have passed said large hawser at the time, and that said hawser was not of the character of a towing line suitable for the purpose of performing the maneuver which said tug was about to undertake as hereinafter set forth." Is that correct or incorrect?

A. We can use that hawser for that work.

Q. Now, Captain, I want to read you this:

"And that said hawser was not of the character of a towing hawser suitable for the purpose of performing the maneuver which said tug was about to undertake, as hereinafter set forth—" And "hereinafter" describes that maneuver; was that correct, or was it not correct?

(Testimony of W. J. Gray.)

A. Well, you can take it either way.

Q. Now, Captain, do you know whether there were any other lines on board this tug that were suitable for this maneuver?

A. No, all her lines were for other purposes. She only had the one tow-line.

Q. She had other lines on board, didn't she?

A. Yes, but they were all—

Q. That answers it. I have asked you a good many times, Captain, just to answer the questions.

Mr. CAMPBELL.—Mr. Sutro, I have never seen a witness yet who was not given an opportunity to explain.

Mr. SUTRO.—But he will not answer the questions. Of course, if your Honor wants an explanation, he can make it.

The COURT.—No, the Court does not require an explanation, but if the witness thinks an explanation is necessary he is [226] entitled to make it. I am not objecting at all. Any way is satisfactory to me, so long as we get the testimony in.

Mr. SUTRO.—I am willing to let him talk, but it seems to me I am entitled to an answer to the question without a lecture. Now, where was I?

The COURT.—You were asking him on whether he had other lines aboard.

Mr. SUTRO.—Oh, yes. You may proceed, Captain.

A. Yes, there were other lines aboard, but they were not suitable for that kind of a job.

Q. What kind of a job were they not suitable for?

(Testimony of W. J. Gray.)

A. Where you want a long line.

Q. Were they suitable for short-line jobs?

A. Yes.

Q. Were they in good condition? A. Yes.

Q. All of them?

A. We generally have two in first-class condition and the others a little worn.

Q. Do you say you had two lines in first-class condition on the tug on this day, besides the hawser?

A. We invariably keep two good lines aboard.

Q. Do you say you had two lines in first-class condition on the tug on this day, besides the hawser?

The COURT.—That question can be answered by "Yes" or "No"; it is the shortest and quickest answer? A. Yes, sir.

Mr. SUTRO.—Q. Will you describe the size of them? A. 7-inch.

Q. Both of them 7 inches? A. Yes.

Q. Both 20 fathoms long?

A. Yes, sir, about 20.

Q. Are those the lines which Mr. Kraatz described as being not as good as the line that was passed out?

A. We have no lines aboard as poor as the ones that were passed from the vessel.

Q. Did you hear Mr. Kraatz's testimony?

A. Yes. We condemn lines before they get in that condition. [227]

Q. Were you on board the tug that day?

A. No.

Q. How long before this day had you seen these lines? A. I couldn't tell you that.

(Testimony of W. J. Gray.)

Q. How do you know what condition the lines were in?

A. Because it is the order to have lines aboard that—

Q. Because it is the order? A. Yes.

Q. You don't know, of your own knowledge, whether there was a single line on board that tug that day, do you?

A. No, not of my own knowledge.

Q. And when you testified just now that Mr. Kraatz's testimony—and you did so testify in effect—was wrong, you were testifying to your general opinion about the situation, were you not?

A. My general knowledge.

Q. Your general opinion?

A. No, sir, my general knowledge.

Q. You had no knowledge, had you?

A. I know what is aboard those boats.

Q. Did you see what was aboard of them?

A. I cannot recollect just particularly now, this was a year ago.

Q. You don't know just what lines were on the "Fearless" that day, Captain, do you?

A. I think I do.

Q. And you say now there were two 7-inch lines on board the vessel that were better than the lines that were passed out? A. Yes, two 7's and two 6's.

Q. And you saw them there?

A. I cannot tell that at this length of time.

Q. All you know about it is that you gave your orders on these matters, and that you have pretty

(Testimony of W. J. Gray.)

good men under you, and you think they obey your orders: Isn't that right? A. That's right.

Q. And that is what you are basing your answer on? A. Yes.

Q. And if one of your men happened to slip, or if one of the men under him happened to slip, that would let you out? [228]

A. But they cannot operate unless they have lines.

Q. Yes, they had four lines, and Mr. Kraatz described them in great detail, and said they were all bad; as a matter of fact your knowledge is based on the orders you give your men, and on the presumption that those orders are complied with?

A. Yes, sir.

Q. Upon the investigation you made at the time of this accident, you discovered that this line was cast off after the engine was started ahead, didn't you? A. No, sir.

Q. I will ask you whether this is a correct statement in the answer which you verified:

"Said steamship stopped backing her engines, and said tug, as was usual and customary in similar cases, also stopped her engines and prepared to cast off said line; that the officer stationed on the poop deck of said steamship thereupon directed his crew to take in said line, and at least one-half of the line that was out was so hauled in by said crew, when said steamship, with her helm to starboard, started her engines ahead, whereupon said line was cast off from said tug." Is that correct.

A. I don't think so.

(Testimony of W. J. Gray.)

Q. Did you, on the 15th day of March, 1916, say to Mr. C. H. Williamson, in San Francisco, at your office, that the "Edith" was about 700 feet out from the end of the pier and that the tug master did not let go the tow-line until he saw that the propeller of the "Edith" was going ahead. Did you make that statement?

A. No, sir, I did not make that statement.

Q. Or anything to that effect? A. Yes, sir.

Q. What did you say?

A. I said that the vessel was over 700 feet out from the dock, and the master of the tug never attempted to cast that line off until the ship stopped backing, until he stopped his propeller, and about the time the line was ready to be cast off, at the time that this man Kraatz had the line in his [229] hand, she started her wheel ahead and dragged it away from him. That is what I told him.

Q. Did you hear the testimony here this afternoon that the line was cast off before the wheel was started ahead?

A. Well, I might have heard it, I am not sure.

Q. It is not correct, in your opinion?

Mr. CAMPBELL.—If your Honor please, that is immaterial, irrelevant and incompetent.

Mr. SUTRO.—I want to get the facts. I will withdraw the question if you object to it.

Q. The line was cast off before the wheel was started, you say?

A. Before it was started forward.

The COURT.—He was not there; evidently what-

(Testimony of W. J. Gray.)

ever information he has is open to us, we are trying to pry it out from people under oath, and we will be lucky if we get it.

Mr. SUTRO.—I think so, your Honor.

The COURT.—I don't mean that the men are falsifying, but they see things differently and recall them differently.

Mr. SUTRO.—I think it has been said that three witnesses will go through a room and not see the same things, and they will be perfectly honest.

The COURT.—No doubt about that.

Mr. SUTRO.—Q. Now, Captain, I don't think there is any question about this, but I want to be sure. What your tugboat captain intended to do was to tow this vessel out by the stern, get the line off in some proper way, have it hauled in in some proper way, and then either by the drifting of the vessel of the maneuvering of their wheels, get them in position so he could take a bow-line: Is that so?

Mr. CAMPBELL.—I object to that. He is asking this witness' idea as to what the captain's intention was; in other words, he [230] is asking this man to read the captain's mind.

The COURT.—That is true.

Mr. SUTRO.—Q. Didn't you give the captain his instructions that day?

A. No, sir. He was instructed to haul the vessel out on a stern line. That is all the instruction that was given to him in the office.

Q. All right, I will withdraw that other question if Mr. Campbell objects to it. You have described

(Testimony of W. J. Gray.)

a maneuver here, such as was attempted, in your direct examination, where a vessel is towed out by the stern, the stern line is dropped, the ship swings into a position where the tug gets the bow-line, and it takes the bow-line and goes on; is it not a fact that in endeavoring to perform that maneuver on that day the "Edith" would inevitably have to drift some distance, however slight?

A. Both drift together.

Q. Is it not a fact, Captain, that in performing that maneuver, if it was performed exactly as it should be in your opinion performed, is it not a fact that the "Edith" would inevitably have to drift some distance? A. Yes, sir.

Q. And the distance she would drift would depend upon wind and tide? A. Yes.

Q. Is it a fact, Captain, that seamen recognize the rule that when a vessel is in a port, particularly a strange port to the master, the tugboat captain is supposed to be familiar with the winds and the tides and the master of the vessel not necessarily so?

A. Yes; the tugboat man is familiar with the current and the wind.

Q. And he is supposed to have a particularly accurate knowledge of those, and he usually has?

A. He has got an accurate knowledge of them, particularly any of the old hands.

Q. Now, if the "Edith" had to drift in performing this maneuver because her propeller had to be topped, that involved the necessity [231] of the tug taking a line from her while she was drifting in

(Testimony of W. J. Gray.)

the opposite direction: Isn't that so? A. No, sir.

Q. It is not? A. No, sir.

Q. You say that in taking the "Great Northern" and the "Northern Pacific" out of the docks you furnish the line?

A. Taking them out, yes; putting them in they furnish it.

Q. I say, that you say that in taking the "Great Northern" and the "Northern Pacific" out of the dock you furnish the line? A. Yes.

Q. Aren't there a great many cases where a vessel has no power and a tugboat service is rendered to the vessel where the tugboat is in charge and where the master of the tug stands by his tug, is on the tug?

A. Not if we know it.

Q. Not if you know it?

A. Not if we know it, sir.

Q. Then Captain Randall's practice in that regard, of sometimes going out on his tug when he is in charge of the tow, is not the customary practice?

A. It is not the custom to take a vessel away from the dock without there is either a boat alongside of her or she has her own power.

Q. Is it ever done?

A. I tried while I heard them testifying to that to think of one, but I couldn't think of one, and I would not allow them to do it. Frequently we use two tugs, one on a stern line and one alongside.

Q. Now, Captain, if the "Edith" had engaged for the tug's lines, or if she had had an understanding with you that in case she wanted them she was to

(Testimony of W. J. Gray.)

have them, would that 12-inch hawser have been passed up to the "Edith"? A. Yes, sir.

Redirect Examination.

Mr. CAMPBELL.—Q. Captain, when you said that you determined in your own office whether they were to assist or it was to be a flat towage, do you mean that that is determined by you, or [232] determined by arrangement that is made between the owner or master of the steamer to be towed?

A. It is an arrangement with the tug company and the agent or master of the ship that is going to be towed.

The COURT.—Q. It would depend upon the contract? A. Yes, sir.

The COURT.—We will take this up again tomorrow afternoon at two o'clock.

(Further hearing was thereupon continued to Wednesday, June 6, 1917, at 2 P. M.)

[Endorsed]: Filed Jun. 7, 1917. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [233]

In the United States District Court for the Southern Division of the Northern District of California, First Division.

Before: Hon. MAURICE T. DOOLING, Judge.

No. 16,031. Vol. 2.

A. H. BULL & COMPANY, INC., a Corporation,
Libelant,

vs.

THE AMERICAN STEAM TUG "FEARLESS," Etc.,
Respondent,

SHIPOWNERS & MERCHANTS' TUGBOAT COMPANY, a Corporation,
Claimant.

WEDNESDAY, JUNE 6, 1917.

Counsel Appearing:

For the Libelant: OSCAR SUTRO, Esq.

For the Claimant: IRA A. CAMPBELL, Esq.

Testimony of C. Randall, for Claimant.

C. RANDALL, called for the claimant, sworn.

Mr. CAMPBELL.—Q. Are you superintendent of the Shipowners & Merchants' Tugboat Company?

A. Yes.

Q. Were you such in March, 1916? A. Yes.

Q. At the time of the "Edith" accident?

A. Yes.

Q. Do you hold a master's certificate? A. Yes.

Q. Did you ascertain from your records the weight

(Testimony of C. Randall.)

of wire that was used to make the pennant that is fastened to the towing hawser of the tug "Fearless" at that time? A. Yes.

Q. What did it weigh per foot?

A. 3½ pounds.

The COURT.—Q. Per foot? A. Yes.

Mr. CAMPBELL.—Q. What was the size of the wire?

A. 1½ inch.

Q. Who received the order and arranged for this towing service? [234] A. I did.

Q. From whom did you receive your communication?

A. Some people at Pier 46, the Luckenbach people, the Luckenbach Company, for the captain of the steamer "Edith."

Q. Do you know whether it was the captain in person who talked to you over the phone?

A. No, it was not the captain.

Q. What character of service was arranged for?

A. A tug to help him to Hunter's Point drydock.

Q. To help him to Hunter's Point drydock?

A. Yes.

Q. How long have you been superintendent of the Shipowners and Merchants' Tugboat Company?

A. Eleven years.

Q. I want to ask you the question as to whether or not in your judgment, captain—

Mr. SUTRO.—You are asking the captain as an expert I suppose?

(Testimony of C. Randall.)

Mr. CAMPBELL.—Yes, I am. He was not there at the time.

Q. Captain, if the "Edith" was lying on the southerly side of Pier 44 and the tug "Fearless" with a hawser of approximately 25 fathoms in length was fastened to the stern of the "Edith" and the "Edith" was with her own power and by the assistance of the tug pulled out into the stream so that she was a distance of say 700 feet off the end of Pier 44, and if at that time there was a strong southeast wind and an ebb tide be running—I ask you whether or not in your judgment it would have been possible for that steamer to have turned about in her course and headed for Hunter's Point drydock by going ahead on a starboard helm with her engines working ahead and the tug pulling astern on a starboard helm so as to swing the "Edith's" stern to starboard, the "Edith" at the time being in a light condition?

A. That would depend on the draught of the vessel a good deal—I understand the wind was southeast?

Q. The wind was southeast?

A. It would depend upon the trim **[235]** of the ship, that is, what her draught would be forward and aft.

Q. Assuming that the 'Edith" was 340 feet long, about 40 feet in beam and was drawing approximately 12 feet aft and 8 feet forward?

A. You could not do it.

Q. Why not? What would prevent it?

A. The bow would blow off to the leeward too fast

(Testimony of C. Randall.)

for you to hold the stern down on account of the difference in the draught of the ends. If she had been as much by the bow as she was by the stern it could be done very readily.

Q. Captain, did you examine the ends or the eyes of the two hawsers on the "Edith" which parted, at the time that they were brought back to the Company's office by the "Fearless"? A. Yes.

Q. In what condition were the two lines?

A. Poor condition.

Q. Just describe to the Court what you mean by that.

A. One of them, the 6-inch rope was what I would say rotten, very poor; the 7-inch was a little better, but that was in very poor condition; I think it had been stowed away wet the way it appeared to me; it had a very sour smell and the threads were very brittle like, as though it might have been burned or steamed; sometimes ropes will get that way when you stow them away wet.

Cross-examination.

Mr. SUTRO.—Q. Are you related to W. M. Randall? A. Yes.

Q. What relative, if any? A. Brother.

Q. A brother? A. Yes.

Q. You have considerable interest in this controversy, haven't you? A. Why, yes.

Q. And the matter on which you have expressed your expert opinion here is one that affects your company considerably, doesn't it?

A. Well, we are interested.

(Testimony of C. Randall.)

Q. You understood that the hypothetical question that was put to you, the hypothetical case that was put to you was the case that is involved here, didn't you? A. Yes. **[236]**

Q. In which your company is the claimant of the vessel and you really are expressing an opinion in your own interest, are you not?

A. Well, I am giving my opinion by experience.

Q. Now, as I understood you captain, the reason that you did not think this turn could not be made in this hypothetical case in which you expressed your opinion was because the bow would blow off to the leeward? A. Yes.

Q. Suppose the wind had been blowing in the opposite direction or suppose there were no wind, would you then say that the maneuver could be done?

A. Without any wind it could be done, yes.

Q. Or without the movement of the tide—did that affect your opinion?

A. No. The wind in this particular case would have more to do with it than the tide.

Q. Now, to a person not familiar with the condition of the wind, of course that maneuver would seem a perfectly proper one, would it not?

A. Well, it is not the proper way to handle a ship.

Q. It could be done though?

A. It could be done—lots of things are done.

Q. You as a seafaring man do not expect the same knowledge of port tides and port winds on the part

(Testimony of C. Randall.)

of visiting captains that you do of your own tugboat captains?

A. No. We are more familiar with the local conditions.

Q. You are supposed to be and you are peculiarly familiar with local conditions? A. Yes.

Q. That is your business? A. Yes.

Q. To keep yourself informed about that?

A. Yes.

Q. And that applies to your tugboat captains?

A. Always.

Q. And that is really true of tugboat captains in every port, is it not? A. Well, it is here.

Q. So far as your knowledge goes pilots and tugboat captains are supposed to be particularly familiar with local conditions of [237] wind and tide?

A. Yes.

Q. Is that not so? A. Yes.

Q. More so than seafaring men who enter the port? A. Yes.

Q. You stated that you saw the two lines here, the ends of two lines; one was a 6-inch and the other a 7-inch?

A. I should say about 6 and about 7; I am not positive.

Q. One inch more or less you would not be positive about?

A. No; one was a little larger than the other.

Q. It might have been a 7 or 8?

A. No, I think they were 6 or 7.

Q. You would not say positively one of those lines

(Testimony of C. Randall.)

was not an 8-inch line, would you?

Mr. CAMPBELL.—We have the lines in Court.

A. No, I would not say it was not. My opinion is that it was a 6 and 7.

Mr. SUTRO.—Q. You said that one of them was rotten and one was in poor condition?

A. Poor condition, yes.

Q. Were you familiar with the lines that were on board the tug "Fearless" on this day? A. Yes.

Q. Did you see them on that day?

A. I see them about every day while the boat is in port.

Q. You saw them on that day?

A. I don't know that I did on that particular day.

Q. Can you tell me what lines were on that tug that day? A. Her regular equipment.

Q. Do you know of your own knowledge, or are you simply proceeding on what you believe was the practice of your company?

A. No; I know what lines they carry on board of the tugs, all of them; that is the working lines.

Q. There was a 12-inch hawser on that tug, was there not? A. Yes.

Q. Do you know that with the exception of the 12-inch hawser [238] every line on that tug was in worse condition than either of these two lines?

A. They were not.

Q. That is your opinion? A. I know it.

Q. You did not see them on that day, did you?

A. But I seen them from time to time.

Q. Just tell me what lines were on that tug?

(Testimony of C. Randall.)

A. The ones that were on her?

Q. Yes.

A. I could tell you several that were on her.

Q. What lines were on the tug?

A. They carry 7-inch hawsers, 7-inch rope.

Q. 7-inch rope? A. Yes.

Q. How many? A. Not less than four.

Q. Were there four on the "Fearless" on this day? A. I did not see them on that day.

Q. Were there aboard the "Fearless" that day?

A. I don't know that there were four.

Q. You don't know how many 7-inch hawsers were on the "Fearless" that day?

A. I did not see them.

Q. Do you know how many there were on the "Fearless" that day?

A. Not on that day, I don't know that there were four; there might have been five.

Q. There might have been five?

A. But her equipment is four.

Q. You testified here a few minutes ago that you knew what ropes were on the "Fearless" that day; and you have undertaken to compare their condition with the condition of these two lines. Now, I want to know from you what lines were on the "Fearless" on that day about which you are testifying?

A. Her regular equipment is four lines.

Q. That isn't an answer to my question, captain. If you know what lines were on the "Fearless" that day tell us what they were?

A. I did not count them, but I do know she has a

(Testimony of C. Randall.)

regular equipment of 7-inch ropes. **[239]**

Q. How many? A. Four.

Q. Were they on her that day?

A. I don't know.

Q. Do you know whether there were any on her on that day? A. Yes.

Q. How many are you sure there were there?

A. I would not say.

Q. What other ropes were on the "Fearless" that day? A. Besides which?

Q. Besides the four 7-inch hawsers?

A. 12-inch hawser.

Q. What other lines?

A. I don't know that there were any others.

Q. Were there any 6-inch lines on the "Fearless" that day?

A. I am not prepared to say; I don't know.

Q. What was the length of these 7-inch hawsers?

A. About 20 fathoms.

Q. Any more?

A. Well, there is a piece of wire goes on them, on the end, a short piece of wire to avoid chafing.

Q. How much of a piece of wire?

A. Probably 4 to 6 fathoms—maybe 5 fathoms.

Q. So that would make the total 25 fathoms, would it not?

A. Well hardly; there is a splice of course taken out of the rope and two splices in the wire.

Q. Was there a breast line on the "Fearless" that day?

A. We usually have—they really are all breast

(Testimony of C. Randall.)

lines, the four of them, used for breast line purposes.

Q. You don't know whether there was any 6-inch hawser on her on that day?

A. I could not say; if there was they were not for regular towing on that boat.

Q. But the 7-inch lines were there for the regular towing? A. When we are alongside of vessels.

Q. Are you willing to say there were at least four good towing hawsers on the "Fearless" on that day?

A. There is no doubt she had four, which is her regular equipment.

Q. If she did not have she should have had?

A. Yes. **[240]**

Q. If she did not have four good 7-inch towing lines on that day she should have, shouldn't she?

A. Yes.

Q. By saying, Captain, that she should have had that many I mean that she would not be properly equipped unless she did have them?

A. There is no law on that.

Q. But I mean your opinion?

A. That is my opinion.

Testimony of Emil A. Sandstrom, for Claimant.

EMIL A. SANDSTROM, called for the claimant, sworn.

Mr. CAMPBELL.—Q. How old are you, captain?

A. 55.

Q. What is your business?

A. Seaman; seafaring man.

(Testimony of Emil A. Sandstrom.)

Q. What do you do? Are you a sailor before the mast A. No, master.

Q. Of what? A. Of tugboats.

Q. What tugboat are you captain of now?

A. The "Sea King."

Q. Owned by what company?

A. The Shipowners & Merchants' Tugboat Company.

Q. How long have you been in the towboat business here in San Francisco? A. Since 1888.

Q. Over what waters have you towed? Whereabouts have you towed with your tug?

A. Most everywhere, coastwise, around the bay and rivers; wherever work directs us.

Q. Do you ever tow coastwise? A. Yes.

Q. Wherabouts?

A. Well, anywhere from San Diego to Puget Sound.

Q. Were you the master of the tug "Fearless" at the time of the accident to the "Edith" by her running into Pier 32 in San Francisco harbor?

A. Yes.

Q. Where were you when you received orders to proceed to the "Edith"?

A. Down at the tugboat office, Green Street wharf.

Q. Whereabouts is the tugboat office with respect to the place where the tugs moor or tie up at the Green Street wharf? [241]

A. Well, the tugs tie up at the wharf, and they are always down at the end, the extreme end of the wharf.

(Testimony of Emil A. Sandstrom.)

Q. Which end, the inner end or outer end?

A. The outer end.

Q. What orders did you receive from your company?

A. To go up to assist the steamer "Edith" from 46 to Hunter's Point drydock.

Q. Did you go? A. I did.

Q. About what time of day was it when you reached there?

A. That was about 3:30 or 3:40, somewhere around there.

Q. Where did you find the "Edith" first?

A. The "Edith" was tied up at the north side of 46.

Q. At the inner end or the outer end?

A. The inner end, right up to the bulkhead.

Q. What did you do with your tug when you got up to Pier 46?

A. Well, I got a line on the wharf and waited until the ship got ready.

Q. By the way, what is the length of the "Fearless"? A. Of the ship?

Q. Of the "Fearless"? A. About 100 feet.

Q. What is her beam?

A. 22–6; 22–7; I aint sure which.

Q. How much water does she draw?

A. About 13 feet.

Q. What horse-power has she?

A. She has between 500 and 600.

Q. I ask you to look at this photograph and tell me whether or not that is a picture of the "Fear-

(Testimony of Emil A. Sandstrom.)

less" as she was at that time, save that she is shown here with two masts and then only had one mast?

A. The only difference in the picture is, it is painted black and there she is white, and not having the mainmast nor this gaff.

Q. But otherwise it was the same?

A. But otherwise it is the same boat; there is another exception: the sliding-board was not there.

Q. For what kind of towing, Captain, is the tug "Fearless" used? **[242]** Over what waters do you use the "Fearless" for towing?

A. Well, she has been used accasionally along the coast.

Q. Outside? A. Outside, yes.

Q. In harbor work? A. Harbor work as well.

Q. Now, when you arrived at Pier 46 what did you see about the condition of the "Edith"?

A. She was tied up at the wharf; I didn't see anything unusual in her condition.

Q. What did you do with your tug?

A. Well, I tied up with a line at the wharf to wait until the "Edith" got ready.

Q. Did you have any words with or any communication with any of the officers of the "Edith" at that time?

A. I did. I asked the second mate to give me a line when she would be ready.

Q. Where was the second mate at that time?

A. On the poop.

Q. Did the "Edith" at that time have any mooring lines out astern to the dock?

(Testimony of Emil A. Sandstrom.)

A. Yes, she was moored at both ends.

Q. How did you receive a line from the "Edith"?

A. I asked the mate to give me one of his best lines that he had on the wharf; and I passed the heaving line to wharf and got the line from the wharf to my boat.

Q. How was your boat at that time—what was the position of your tug at that time?

A. The position of my tug was nearly across the slip.

Q. How was she held in that position?

A. With the line—she was held to the wharf with a line, but the wind and tide held her in that cross-wise position.

Q. By a headline from your tug to the wharf?

A. Yes.

Q. Who made fast the heaving line to the "Edith's" line on the dock?

A. The man that was there tending to the letting go of the lines.

Q. How did you then get that line aboard your tug?

A. We hauled it aboard with a heaving line. **[243]**

Q. What was the shape or condition of the end of the line that you received

A. It was apparently a good looking line.

Q. What I want to get at is, did it have an eye in the end of it? A. Yes.

Q. How did you make it fast on your tug?

A. I hung it over one side of the towing-bitt and through the center.

(Testimony of Emil A. Sandstrom.)

Q. Through the center? A. Yes.

Q. You call the side of the towing-bitt the horn of the bitt? A. Yes.

Q. When you received that line, what did they do with the line on the "Edith"?

A. They let go of the stern lines.

Q. What did you do with your tug?

A. I let go of my lines so as to be ready to pull when she would be ready.

Q. Then how did the stern of the "Edith" move?

A. The tide and wind had a tendency to slough the ship across the slip.

Q. Slough her across?

A. Move her away from the side of the wharf.

Q. What did you do then?

A. Well, I started ahead on my boat first to keep the ship in the position.

Q. What kind of a strain did you put on the line?

A. Ordinary strain.

Q. Did you jump on it or jerk on it? A. No.

Q. Then what happened?

A. The line parted.

Q. Whereabouts did it part?

A. Just about the splice of the eye.

Q. Have you got the line with you here in court?

A. I have.

Q. What kind of a break was it?

A. It was not a fair break.

Q. What do you mean by a fair break?

A. A fair break is where a line breaks right across, but in this particular case some strands broke and

(Testimony of Emil A. Sandstrom.)

others held longer—they did not hold, but they held longer than the other ones. [244]

Q. Did you examine the part of the line that was left on the tug to observe its condition? A. I did.

Q. What was its condition?

A. I considered it in poor condition.

Q. What was there about it—what was the condition that led you to that opinion?

A. The line looked good but it appeared to be either overheated or overcome with acid or something to that effect, that damaged that line.

Q. How did that demonstrate itself to you? What was the evidence that led you to that conclusion?

A. The evidence was there because one strand was good, one strand held longer than the other; they did not all part at the same time.

Q. Was there anything in the fibre of the line that gave that indication? A. Yes, there was.

Q. What was it?

A. It can be picked to pieces with your fingers.

Q. Could you demonstrate that to us if we should bring the line in? A. How is that?

Q. Could you show that to us if we should bring the line into the courtroom? A. I could, yes.

Q. After that line was broken what did you do?

A. Well, I waited until the ship got alongside of the wharf again, that is 44.

Q. She drifted?

A. The tide and wind drifted her across the slip, and I got another line out.

(Testimony of Emil A. Sandstrom.)

Q. From what part of the "Edith" was the first line passed, on which side?

A. On the port side.

Q. The first line I am speaking of?

A. The first line.

Q. And the second line was passed on which side?

A. On the starboard side.

Q. What can you say as to whether or not the second line that was passed was a part of the first line?

A. It might have been; that I couldn't say.

Q. That you couldn't say? A. No. [245]

Q. Did that line have an eye in it?

A. It had an eye in it.

Q. How did you make that fast with your tug as compared with the other?

A. The same as the first one, over one side of the towing-bitt and through the center.

Q. About how long would you say the first line was that was passed to you?

A. About 25 fathoms; it might have been a fathom less or more, I could not say.

Q. What was the length of the second line that was passed? A. Apparently the same.

Q. Apparently the same? A. Yes.

Q. After you had the second line passed what did you do? A. Pulled the ship out.

Q. How did you do that?

A. Well, simply pulled her out of the slip, that is all.

Q. In which direction did you pull her?

A. Well, right out of the slip.

(Testimony of Emil A. Sandstrom.)

Q. Straight out into the bay? A. Yes.

Q. Did you receive any assistance from the steamer by her engines?

A. The steamer was backing at the same time.

Q. Now, you subsequently let go from the steamer's hawser, did you, afterwards?

A. I let go after the steamer stopped.

Q. Now, about how far off the end of Pier 44 were you at the time that the hawser was finally let go?

A. Well, in the neighborhood of 700 feet; it might have been a little less or it might have been a little more.

Q. What pier were you about opposite at the time that you let go? A. Well, just about opposite 44.

Q. Opposite 44? A. Yes.

Q. Now, you will explain the circumstances and conditions which attended your letting go of the line. Just explain fully to the Court just what took place?

A. Well, when the ship started backing [246] I sung out to the second mate, or which I thought to be the second mate—I don't know who he was, a man in uniform, to haul in the line, and him and two men that he had with him proceeded to haul in the line.

Q. Where *were* this officer in uniform that you called out to? A. On the poop of the ship.

Q. What did you say to him?

A. I asked him to haul in the line.

Q. Did you stop your tug at that time?

A. I stopped my tug.

Q. How many men actually worked on hauling in the line?

(Testimony of Emil A. Sandstrom.)

A. Three; two men and the second mate.

Q. What was being done with the end of the line that was on your tug while they were hauling it in?

A. Well, I held on to the end as long as I could.

Q. You say you did. Did you personally?

A. No, my men; my crew of course.

Q. What do you mean by saying they hung on as long as they could?

A. Well, I mean by that they did not throw it overboard; they held on to the line so that it could not foul the ship's propeller or get under the ship, as long as they could.

Q. Then what?

A. The ship went ahead on the propeller and on a starboard wheel and pulled the line away from us, after they had about half of it in, or a little more than half of it.

Q. At the time that the line was pulled away from you how close was the tug to the stern of the steamer?

A. Well, now, it might have been 8 or 10 fathoms from the stern of the ship.

Q. How much line was there left out at the time?

A. Well, I figured they had about half of it in or a little more than half of it in; there must have been 12 fathoms out—10 or 12 fathoms out—something like that.

Q. At that time? A. Yes.

Q. Was the mate still on the poop at that time? [247]

A. The mate was still with his men on the poop.

(Testimony of Emil A. Sandstrom.)

Q. At that time did you see the captain on the bridge?

A. Well, I could see him at times walking from side to side.

Q. What did you do after the line was finally let go from your tug?

A. After I let go of the line I turned my boat around and got under his bow.

Q. Did you see the line get in the wheel?

A. No, I did not.

Q. When in fact was the first time that you knew that the line had gotten into the wheel?

A. I didn't know the line was in the wheel until I got back to the tugboat office.

Q. That night? A. That night.

Q. Which way did you turn your tug about to go under his bow? A. On the starboard wheel.

Q. On the starboard wheel?

A. Around the bow.

Q. Along which side of the "Edith" did you pass?

A. Under the starboard bow—along the starboard side.

Q. As you passed along the starboard side did you say anything to the captain of the ship?

A. I asked the captain to give me a good line over the bow.

Q. Where was he at that time?

A. On the bridge.

Q. Did he make any response to you?

A. He made some response but I could not hear what it was.

(Testimony of Emil A. Sandstrom.)

Q. Where did you place your tug at the bow?

A. Right under the bow of the ship.

Q. How close to her stern?

A. That close that it left a mark on my guard, on the boat's guard.

Q. What do you mean—what kind of a mark?

A. Well, it done a little damage under the stem, lying there in the seaway.

Q. Why didn't you put the stem of the tug against the "Edith" and push her around?

A. No, I would have shoved a hole in her.

Q. Why?

A. The seaway—the stem would have cut the plates.

Q. What is the hull of the tug made of?

A. Steel. [248]

Q. And the "Edith" was a steel steamer?

A. Steel.

Q. Did they give you a line right away?

A. They did not give me a line right away, no; I did not get a line until we got away down by 34.

Q. Pier 34? A. Yes.

Q. How did you get from 44 down to 34?

A. Drifting by wind and tide.

Q. By tide and wind? A. Yes.

Q. When you got the line off 34, how close in to 34 were you? A. About 150 feet.

Q. About 150 feet? A. Yes.

Q. How does the tide run—how did the tide run along those piers?

A. It runs pretty much parallel with the wharves.

(Testimony of Emil A. Sandstrom.)

Q. To the ends?

A. To the ends of the wharves.

Q. How did the southeast wind act?

A. About the same, pretty near the same—it might differ a few degrees, but so little I couldn't detect it.

Q. What was it that carried you from a position 600 feet off of Pier 44 to 150 feet off to 34?

A. By the captain going ahead on his propeller, the ship.

Q. Was that all?

A. That is all I could imagine that would bring us that near to the wharf.

Q. Did the wind and tide have any effect?

A. The tide set her in a little but not that much.

Q. What did you do after you got at the bow?

A. Well, I waited there until I got a line.

Q. From where was that line passed to you?

A. It was made fast on the forecastle-head.

Q. Where was it passed to you?

A. From the starboard bow?

Q. From the starboard bow? A. Yes.

Q. How long a line did he give you?

A. Well, I had about 30 [249] fathoms; but after I started pulling it kept on running out a little while, so I had to stop my boat and let them make it fast.

Q. And after it was made fast?

A. After it was made fast it parted.

Q. Where did that part?

A. That parted near the eye.

(Testimony of Emil A. Sandstrom.)

Q. Did you examine the condition of that line?

A. That was a very poor line.

Q. Have you that here with you?

A. I have that here too.

Q. The deck-hand of your tug, Mr. Kraatz yesterday stated on the stand that an argument took place while you were at the bow of the "Edith" over the passing of the line. Was that correct or not?

A. No; there was no argument under the bow of the steamer.

Q. Was there at any time?

A. There were no words spoken at all till the captain told me to go ahead on the line.

Q. What did the captain say to you at that time?

A. He simply told me to pull.

Q. Was there at any time during this voyage any words between you and any officer on the "Edith" about the line?

A. There was in the slip, yes.

Q. What was that?

A. The second mate asked me why I didn't give him my line, my hawser.

Q. What were the words that he used?

A. Well, would I be permitted to answer that?

Q. Yes.

A. He said, "Why in hell don't you give me a hawser"?

Q. What did you say to him?

A. I told him, "You couldn't get my hawser up if you tried it."

Q. What did you mean by that?

(Testimony of Emil A. Sandstrom.)

A. It was too heavy for two men to haul up.

Q. Now, what is your judgment as to whether or not it would have been possible for the men on the forecastle of the "Edith" to have gotten that hawser or that steel pennant up on to the [250] forecastle-head so as to have made it fast for the "Edith" to use it?

A. It all depends on how many men they had there; I don't know how many men they had there; I couldn't see them.

Q. If they only had two men what is your judgment? A. No, two men couldn't do it.

Mr. SUTRO.—That contradicts the evidence in the case; the testimony is there were three men there.

Mr. CAMPBELL.—The mate and two men, I believe the evidence is.

Mr. SUTRO.—The evidence was there were three men on the deck handling the line.

Mr. CAMPBELL.—Including the mate or without him?

Mr. SUTRO.—Including the mate.

Mr. CAMPBELL.—Q. What is your judgment as to whether the mate and two men could have handled that steel pennant and got it up on the forecastle-head? A. No, they could not.

Q. Now, just explain to the Court why.

A. Well, the weight of the steel pennant is too much and the friction is too much.

Q. How would they have to handle it; how would the friction come about? Just explain that.

(Testimony of Emil A. Sandstrom.)

A. Well, the friction comes about in this way. Now, we have a chock for that line on the bow of the ship; while the boat lays under there, you pass the line out of that and try to haul that wire over that chock it would naturally take quite the weight and perhaps a little more, quite the weight of that wire to haul it through that chock.

Q. How far would they have to haul it? Where would they put it?

A. It depends on where the bitt was on the forecastle-head; I couldn't say where those bitts were; sometimes they might be 30 feet away from the chock. I have seen them farther than that away from the chock. [251]

Q. Captain, when the captain told you to go ahead on this line what did you do?

A. I went ahead on the line.

Q. Did the captain at any time ask you for your hawser? A. Not then.

Q. Did the captain of the "Edith" ask you for your hawser? A. No.

Q. Up to the time you got to Hunter's Point?

A. No, the captain never asked me for my hawser.

Q. Did the mate or anyone on the forecastle-head ask you for your hawser? A. No.

Q. Before the line was passed to you did you give any suggestion or say anything to the master of the steamer as to what he should do with his vessel?

A. I asked the captain when I saw there was going to be trouble—I asked him to back on the ship.

Q. Did he back her?

(Testimony of Emil A. Sandstrom.)

A. No, he did not.

Q. After the line parted, after the second line or third line parted, the bow-line, what was done then?

A. Well, the captain backed a little before the line parted; he started backing; but they were too close to the wharf to avoid an accident.

Q. Did he stop backing or continue backing?

A. Well, he stopped; after he struck he stopped backing and the ship swung around the corner of the wharf.

Q. Around the corner of the wharf? A. Yes.

Q. At the time that the line parted where was the steamer with respect to the end of Pier 32?

A. Well, I couldn't really say; she might have been 20 feet off, or she might have been 30 feet off.

Q. Was she inside or outside of Pier 32?

A. She was in a direct line with the end of the wharves.

Q. A direct line with the end of the wharves?

A. Yes; she struck pretty nearly amidships, a little forward of amidships. [252]

Q. I will ask you to look at the diagram that has been put in as Exhibit "A" in Captain McDonald's deposition, and ask you whether or not the "Edith" was in that position at the time the line parted? Yes, that is about the position, only a little further out.

Q. Only a little further out?

A. A little further out than that.

Q. Toward the end of Pier 32?

A Here is 32, isn't it?

Q. Yes.

(Testimony of Emil A. Sandstrom.)

A. Well, she was a little further out; just about here you see, on the corner.

Q. Now, after the "Edith" had swung around alongside of the end of Pier 32, what did she do?

A. She simply started up and went up to Hunter's Point.

Q. To Hunter's Point? A. Yes.

Q. When you got up there did you assist in taking her in?

A. I assisted in taking her in; that is, I passed my hawser up and pulled him in so that he could get his line on the dock.

Q. Did you wait there until the "Edith" was actually in the drydock?

A. I waited there until she was in the slip. As soon as I thought I could do him no more good, after she was in the slip, I went home.

Q. Did you remain there while they did any pumping on the drydock? A. No.

Q. You never saw the line in the wheel then?

A. No.

Q. I ask you, Captain, whether or not in your judgment you could have turned the "Edith" about and headed her for Hunter's Point drydock if at the time instead of letting go of the stern line you had continued to pull with your helm hard astarboard so as to swing her stern around to her starboard, and if the master had gone ahead on a hard astarboard helm at the same time—could you have pivoted or turned the "Edith" about under the conditions of the wind and tide existing there that afternoon?

(Testimony of Emil A. Sandstrom.)

A. Not with that wind.

Q. Why not? A. Too strong. [253]

Q. What effect would it have upon it to prevent it?

A. The ship was light, she had no cargo in, as far as I understand, and she drew very little water forward and the wind kept blowing her bow down.

Q. What way, Captain, in your judgment, was the proper way to turn the ship about?

A. Well, the proper way I would not say—the way I would have done if I had done it, I would have come around on the port wheel.

Q. What do you mean?

A. Kept on backing out until I got my stern up against the wind and tide.

Q. And then gone ahead on the port helm?

A. Then gone ahead on the port wheel.

Q. Where would you have come —down along the wharves?

A. No, naturally I would have started to pull out from the wharves right away.

Q. And swung which way?

A. Swung on the port helm.

Q. Now, were there any vessels anchored in the vicinity of Pier 32 or the piers to the northward of that?

A. There was at Pier 34, and below that there were about three vessels anchored there.

Q. Do you know the names of any one of them?

A. I know the "Santa Paula" was the foremost one.

Q. What is she?

(Testimony of Emil A. Sandstrom.)

A. She is an oil barge.

Q. Belonging to what company?

A. The Union Oil Company.

Q. Is there any usual or customary anchorage ground off these piers, at that place?

A. The forbidden anchorage extends 1300 feet off from the wharves.

Q. Where is the usual anchorage ground south of the ferry and the ferry lanes?

A. They generally keep a line from the end of Mission Street to Alameda Mole, in order to keep that clear, about that line. **[254]**

Q. You anchor to the southwards of that?

A. Yes.

Q. Now, how long had you been master of the "Fearless" at that time?

A. Well, I couldn't just say now but it is in the neighborhood of one and a half years.

Q. Do you know what equipment, what lines she had on board at that time? A. I do.

Q. Will you state to the court what they were and what their condition was?

A. The "Fearless' had a towing hawser, 12-inch towing hawser, with a wire pennant attached and four 7-inch lines 20 fathoms long, and 6 fathom pennant at the end of them, in good condition.

Q. Do you know what the condition was that day?

A. Good.

Q. Captain, if the master of the "Edith" had backed his steamer at the time that you suggested it to him what is your judgment as to whether or

(Testimony of Emil A. Sandstrom.)

not there would have been any collision with the wharf?

Mr. SUTRO.—I object to that as calling for the conclusion of the witness. I do not think that is a matter of expert testimony.

The COURT.—The objection will be overruled.

Mr. CAMPBELL.—Q. Read the question.

(Last question repeated by the Reporter.)

A. Well, my judgment is he would have cleared the wharf, he would not have touched it; very little backing would have done it.

Q. Was there anything, Captain, in the situation that you saw to have prevented the "Edith" from dropping her anchors? A. No.

Q. After you let go of the stern line?

A. None whatever; he was at liberty to let go his anchor at any time from the time he cleared the slip.

Q. Captain, if the master of the "Edith" knew that the line was in his wheel at the time of or shortly after letting go the stern line so that he could not use his engine, what in your judgment would good seamanship have required him to do under those conditions?

A. Well, that would depend upon my anchors, if it was me.

Q. What do you mean by it would depend on your anchors? A. Let go of the anchor.

Q. If that had been done, would there have been in your judgment any collision with that wharf?

A. No, none whatever.

Q. Did anyone aboard the vessel, aboard the

(Testimony of Emil A. Sandstrom.)

"Edith" ever suggest [255] to you that the line was in the wheel? A. No.

Cross-examination.

Mr. SUTRO.—Q. Captain, what was your crew on the day of this accident?

A. The number of men, you mean?

Q. Yes, and their position?

A. Chief engineer, two firemen, two deck-hands and a cook. [256]

Mr. CAMPBELL.—May I ask to interrupt there with one question:

Q. Captain, where were you standing on board of the tug at the time the hawser was let go?

A. Right about where that mast is.

Q. Where the after-mast is shown on this photograph? A. Yes.

Q. On top of this house?

A. Yes, on top of that house.

Q. Where were you at the time you were taking the head-line and pulling on the head-line?

A. I was standing about here, where I could ring the bells and watch my boat at the same time under the bow.

Q. That is opposite the pilot-house?

A. Opposite the pilot-house.

Q. Where do you steer that tug from?

A. Right from this pilot-house.

Q. Inside the pilot-house? A. Yes.

Q. Where does the engine-room come on that tug?

A. The engine-room comes right here.

Q. The last door?

(Testimony of Emil A. Sandstrom.)

A. The last door on that side.

Q. Are there any windows looking back toward the stern?

A. There are windows, one on each side of the after-end of the house.

Q. What would you say is the distance from the after-end of the house to the extreme end of the tug? A. 30 feet—from 30 to 35 feet.

Mr. CAMPBELL.—I will offer that picture in evidence, if your Honor please.

(The picture is marked Claimant's Exhibit "C.")

Mr. SUTRO.—Is that all?

Mr. CAMPBELL.—That is all.

Mr. SUTRO.—Q. You steer that tug from the pilot-house, you say? A. Yes.

Q. That tug is not equipped to steer from the stern? A. No.

Q. You have seen tugs equipped that way, haven't you?

A. I have, but very few of them. This one can be steered, in case [257] of emergency with relieving tackles from the quadrant aft—the quadrant on the rudder.

Q. Did you at any time on that day steer her from the stern? A. No, I never did.

Q. Now, you say that apart from yourself, or, rather, that your crew on that day was the chief engineer, two firemen, two deck-hands and one cook.

A. Correct.

Q. There is an assistant engineer, is there not, that belongs on the tug?

(Testimony of Emil A. Sandstrom.)

A. There is an assistant engineer, two assistants going outside, but not in the bay. There might have been at that particular time, but I wouldn't be sure, because we carry an extra crew for outside.

Q. How many tugs have you been on since you have had the "Fearless"?

A. Since I have had the "Fearless"?

Q. Yes. A. Only two since I have had her.

Q. What were they?

A. The "Sea Eagle" and "Sea King."

Q. You have discussed this case a good deal, I suppose, haven't you, with your superior officers and the company? A. How is that?

Q. You have discussed this case a good deal, I suppose, haven't you, with your superior officers?

A. Well, I have not been in contact with any of it, to speak of, since that.

Q. You undoubtedly reported this occurrence shortly after the accident?

A. I reported the occurrence at the office when I arrived there.

Q. Since that time, have you discussed it frequently? A. No.

Q. Have you discussed it at all?

A. We have talked about it, but nothing in particular.

Q. Haven't gone into detail about it? A. No.

Q. So that the recollection you are giving us here today is the recollection of events as they took place at the time of this accident?

A. Yes, to the best of my recollection. [258]

(Testimony of Emil A. Sandstrom.)

Q. You have not particularly refreshed your memory about it? A. No.

Q. Have not particularly refreshed your memory about the facts, have you? A. No.

Q. You are just giving us your best recollection?

A. That impressed me so hard when it happened, that it will stay there, stay there for 20 years.

Q. You are giving us your best recollection of it now? A. Correct.

Q. When did you go on the "Sea Eagle"?

A. The "Sea Eagle," in the beginning of November.

Q. 1916? A. Last year, yes.

Q. And up to that time had you remained on the "Fearless"? A. No.

Q. When did you leave the "Fearless"?

A. I was on the "Sea King" previous to that.

Q. When did you leave the "Fearless'?

A. That was somewhere in the spring of the year.

Q. The spring of 1916?

A. Yes—about the beginning of June, I should think.

Q. Now, the equipment of this tug varies from time to time, does it not? You carry different lines at different times?

A. No, we carry the same sized lines all the time.

Q. Then when you testified here today that the "Fearless" on this day had 47-inch lines on board—

A. Yes.

Q. (Continuing.) You were testifying from your knowledge of the general practice?

(Testimony of Emil A. Sandstrom.)

A. What I know that we had.

Q. You have not an independent recollection of each one of those lines have you?

A. No, I have not.

Q. You can't call up a picture, can you, of the four lines that were on that tug? [259]

A. I know they were good.

Q. You always aim to carry good lines?

A. We are bound to carry good lines because poor lines won't hold.

Q. You always aim to carry good ones? A. Yes.

Q. But you do not have any independent recollection now?

A. I have an independent recollection of those four lines, because we were doing bay work, and it was just after getting it aboard for bay work.

Q. Did you have any 6-inch lines aboard?

A. One.

Q. Where was that? A. Forward.

Q. Where were these 47-inch lines kept?

A. Two forward and two aft.

Q. Were any of them below?

A. We had a new one down below.

Q. Was that one of the four?

A. No, that is outside of the four; that is extra.

Q. In addition to the four?

A. Yes; but we had those four on deck.

Q. And the length of those lines, you say, was 20 fathoms?

A. The length of the lines was 20 fathoms, and the wire is about 6.

(Testimony of Emil A. Sandstrom.)

Q. Making 26 fathoms altogether?

A. About that, yes.

Q. Were they all the same size?

A. All the same size.

Q. Was the condition of all of them the same?

A. As near as I remember, yes.

Q. All about the same condition?

A. All about the same condition.

Q. All just about new?

A. Well, no, not exactly new. We had two new lines that had not been used half a dozen times, but the other two had been used for possibly a month or so.

Q. These lines were not heavy enough for towing purposes? A. No, never used for towing.

Q. Never used for towing? A. No. [260]

Q. What did you use them for.

A. For tying up the boat alongside the dock.

Q. So that it is your opinion that these lines could not be used for towing purposes?

A. They could, but you would have to bend two together to do it.

Q. Now, Captain, what was the first line that was passed to you from the "Edith"; was it a port line or a starboard line? A. From the port side.

Q. The first one. You are clear about that?

A. I am clear about that, yes.

Q. What was the second line that was passed to you? A. That was from the starboard side.

Q. Are you equally clear about that?

A. I am equally clear about that.

(Testimony of Emil A. Sandstrom.)

Q. I ask you that because there has been some divergence of opinion here as to whether or not they were port or starboard.

A. Well, different men may not recollect all these things, but—

Q. (Intg.) You are positive?

A. I was in command, and know where they came from.

Q. You are positive that the first was a port line and the second a starboard line?

A. I am positive of that.

Q. What instructions did you get, if any, from the captain of the "Edith"?

A. I did not get any instructions from the captain of the "Edith" except to go ahead.

Q. Did you consult with him before you went out of the slip? A. No.

Q. Did you have a talk with anybody at the office as to what should be done?

A. Captain Randall, at the office, told me what to do.

Q. What did he tell you to do?

A. He told me to go up there and assist the ship to the drydock.

Q. Did he say anything else?

A. Nothing else. [261]

Q. When you got up to the "Edith," did you have any consultation with the captain? A. No.

Q. You waited until he got ready and then you—

A. (Intg.) Waited until he got ready and told me to go ahead.

(Testimony of Emil A. Sandstrom.)

Q. Did you consider this a towage contract, or what you call an assist?

A. They call it an assist.

Q. In an assist, you take the orders of the master of the vessel?

A. Take the orders from the master.

Q. You make the lines fast that he tells you?

A. We generally arrange it, making fast the line ourselves.

Q. You do not wait for his orders about that?

A. When I had enough I told him to make fast.

Q. Did you drop the line when he told you to?

A. In this particular case he did not tell me to.

Q. Now, I am talking about an assist. As I understand it, there are two kinds of towage arrangements; one is where you have a straight tow a towage contract a towage duty, and the other where you have what they call an assist: Isn't that correct?

A. Correct.

Q. You distinguish between those two cases?

A. Yes, I do.

Q. And they are generally distinguished, aren't they? They are generally recognized as two kinds of service? A. Yes.

Q. One is called towage and the other is called an assist?

A. An assist; that is also a tow, to assist.

Q. As a matter of fact, is there any difference between the two kinds of service?

A. Well, there is.

Q. In the one case you take your orders—in one

(Testimony of Emil A. Sandstrom.)

case you are in charge and the other you are not?

A. Correct.

Q. Is that the difference?

A. That is the difference.

Q. Now, in those cases in which you are in charge, the thing is done the way you direct? A. Yes.

Q. And in those cases in which you are not in charge you get [262] orders as to how it should be done: Is that correct? A. Yes.

Q. Is that correct? A. Correct.

Q. So that in the case of an assist, you would be getting the orders of the captain, would you?

A. I would be getting the orders from the captain, yes.

Q. What was your purpose in taking this line from the starboard quarter instead of from the port quarter, the second line?

A. Well, because I was lying alongside the wharf, the same as the ship, and I possibly saved a minute or two by getting the line out from the starboard side instead of dragging it over from the port side.

Q. It would also help you hold the stern up against the tide?

A. Also help to keep the ship away from the wharf.

Q. As a matter of fact, she scraped along the wharf, didn't she, a little, in coming out?

A. She pressed along the wharf all the distance out—the tide and wind kept her in.

Q. The tide was pressing her in? A. Yes.

Q. As she was coming out, you were holding her stern up against the wind and tide with this star-

(Testimony of Emil A. Sandstrom.)

board line? A. Correct.

Q. And the tide was sort of pressing her against the dock, and she scraped along the dock a little bit?

A. She might have scraped a little, yes, bound to.

Q. Didn't the captain, as a matter of fact, stop his engine so as to slow her stern way?

A. I couldn't say that he did; I don't remember.

Q. Don't you remember that she was scraping along the dock and that while you were holding her stern up—I am talking before she got clear.

A. Before she got clear, yes.

Q. You held her stern up, he stopped his engines and slowed the sternway?

A. No, I am in doubt about that; I don't think he did.

Q. You are not positive?

A. I am not positive, no. [263]

Q. She came out with a pretty good sternway, didn't she? A. No, not very big.

Q. Now, you can see that diagram from where you are sitting, can't you, Captain?

A. Yes, I can see it.

Q. Is that lower position there of the larger model and the smaller one about the position of the "Edith" and the tug when you let go of that line?

A. The first line or the second line?

Q. The second line. A. No.

Q. Let me get clear with you about one thing. The first line really has nothing to do with this case, has it, so far as any damage to the "Edith" is concerned?

A. No.

(Testimony of Emil A. Sandstrom.)

Q. After that line parted she merely drifted across the slip? A. Correct.

Q. And then you got the second line? A. Yes.

Q. And it was after that, really that the incidents occurred which led up to the accident? A. Yes.

Q. The first line, the parting of it, really had nothing to do with it? A. No.

Q. What is incorrect about that position as you see it there?

A. Well, my tug was not in that position.

Q. How was it placed, Captain? How was it headed, I mean? I will turn it. You tell me which way you want it turned.

Mr. CAMPBELL.—Let him place it.

Mr. SUTRO.—Suppose you place it, Captain.

A. This is the position when the captain stopped; but when we let go of the line I was more under the stern here.

Q. Were you more to the port of the stern, or were you dead under the stern?

A. No, a little more to port; you see, the wind kept blowing the ship down.

Q. Now, the position that you have shown us there is about the position that he was in when his engine stopped. A. That is about it, yes. [264]

Q. The tug was pretty well astern of the "Edith," was it not?

A. Pretty well astern, yes, a little more on the port quarter.

Q. Now, Captain, just assume for a minute—I am not asking you to accept this as a supposititious case,

(Testimony of Emil A. Sandstrom.)

but assume that he was going to turn his bow to port by starboarding his helm, if the tug was going to pull his stern around, it could do it there as well as anywhere else, couldn't it?

A. No, not with that wind and tide.

Q. I say, eliminating the wind and tide, and assuming you were going to do it that way at all, you could do it as well in that position as any other, couldn't you? A. Yes, providing there was no wind.

Q. Providing there was no wind and tide. So that if the master was going to turn the ship by turning her bow to port—which he would do by starboarding his helm, wouldn't he? A. Yes.

Q. If he was going to turn his bow to port, he would starboard his helm? A. Correct.

Q. And if it could be done at all with that tide and wind, or if there was no wind or tide and the tug was in a position where it could pull the "Edith" around either way—of course, if your tug was off here to port you could not do it?

A. No, but I was not off to port.

Q. You were right here?

A. Until after the line was slacked up.

Q. At the time the engine stopped, however, you were in a position where you could have pulled the stern around if the wind and tide had permitted it?

A. Yes.

Q. You did not get any instructions from the master to let go? A. No.

Q. You used your own judgment?

A. I used my own judgment; when he stopped his

(Testimony of Emil A. Sandstrom.)

engine, I though it was time to let go. **[265]**

Q. You did not let go right away; you took the line off the bitt?

A. Took the line off the bitt and told him to haul in.

Q. You had one of your men holding the line?

A. Yes, two of them.

Q. But, of course, holding the line was about the same as letting go, was it not? At least, having a man holding it? A. So as to be ready to let go.

Q. A man could not hold that line against very much pressure, could he? A. No.

Q. Was there not quite a bight in that line?

A. No, not a great deal.

Q. Was there any bight in it at all?

A. Very little line out; it touched the water, but that is about all.

The COURT.—What is bothering me is—in hauling in that line it is not quite clear to me how the men on the "Edith" could haul in the line and still the deck-hand on the "Fearless" could retain hold of it.

A. The two ships are coming together gradually.

Q. What was causing them to come together?

A. I stopped my boat.

Q. He had stopped his, too?

A. He stopped his first, but the ship carried a little sternway.

Q. She still had sternway?

A. She still had a little sternway on.

Mr. SUTRO.—Q. Captain, wasn't her stern

(Testimony of Emil A. Sandstrom.)

swinging down with the tide toward the position that we see on the chart there?

A. No, no; that second position is wrong.

Q. That second position is supposed to show the position just after you got that bow-line?

A. After I got the bow-line?

Q. Yes. A. But that ain't anywhere near it.

Q. Will you come and fix that for us the way it should be? This is just after you got the bow-line.

A. You mean before I started to pull?

Q. Yes, as you started to pull. You started to pull as soon as you got the bow-line?

A. Here is where we were when I started to **[266]** pull; when I got the line I laid here.

Q. Put it the way you were when you started to pull, Captain. A. When I started to pull.

Q. Is that about correct?

A. That is about correct.

Q. When you pinned that model there just now, did you have in mind how close you were putting it to Pier 34? Is that where you want it?

A. About 150 feet from that wharf.

Q. About 150 feet from 34. Do you think the "Edith" could have dropped her anchors in that position with safety? A. Not there.

Q. So that after the line parted she could not have dropped her anchor without damaging herself?

A. No, she was too close, there.

Q. She would have swung right onto the pier?

A. She would have touched the wharves, yes.

Q. Now, I want to ask you again, after the

(Testimony of Emil A. Sandstrom.)

"Edith's" engines stopped when you came out from Pier 44, didn't she commence to carry down with the tide and wind and didn't her stern pull with the tide and wind toward the piers? In other words, didn't she start to turn?

A. She laid pretty near broadside to the wind.

Q. Didn't her stern go down faster than her bow?

A. It might have been a little bit faster, yes, a little faster.

Q. Now, you were coming down with the wind and tide, too, weren't you? A. Yes, the same.

Q. And your stern was swinging down with the tide and wind? A. No.

Q. Then the stern of the "Edith" was swinging away from your stern, was it not? A. Gradually.

Q. It started to swing just as soon as she stopped her engines, didn't it?

A. Not exactly at the minute.

Q. But within a few minutes?

A. Very shortly afterwards.

Q. Wasn't there a very strong wind and tide running there? [267]

A. The tide was not very strong; I have seen lots of stronger tides, but there was considerable wind.

Q. Well, we have got some figures here which show that the tide was low at six o'clock, or 6:02, or 6:08, and it was high water at about 12; so at 4 o'clock that would be about three-quarter ebb tide, would it not?

A. Yes.

Q. How fast do you think that tide was running?

A. In the neighborhood of 3 miles an hour.

(Testimony of Emil A. Sandstrom.)

Q. So that you had a 3-mile tide and the wind that day was 18 miles an hour, blowing southeast; that would tend to make that vessel drift pretty fast, wouldn't it?

A. Yes, she would drift pretty fast, being a light ship.

Q. In the meantime, as I understand you, the lines had been taken off your bitts on the "Fearless" and they were hauling them in on the "Edith"?

A. They were hauling them in on the "Edith."

Q. Now, if that third line had held, if that had been a good line, a sound line, you could have held the "Edith," couldn't you?

A. I could have swung her, but she would have still struck the dock.

Q. You could have held her?

A. I could have saved the blow.

Q. You could have saved the blow? A. Yes.

Q. What size line was that? A. 6-inch line.

Q. 6-inch? A. Very poor line, apparently.

Q. Very poor line?

A. Yes; too poor for a tugboat to pull on.

Q. It was poorer than anything else you had on board? A. Yes.

Q. And the man that handled your lines on board was mistaken if he said that it was a better line than anything you had on board? A. A better line?

Q. Yes.

The COURT.—Except the 12-inch line.

Mr. SUTRO.—Except the 12-inch line.

A. No.

(Testimony of Emil A. Sandstrom.)

Q. It was not? A. No. [268]

Q. Did you have any line on board the "Fearless" that was as bad as this 6-inch line—did you have any line on board the "Fearless" that was as bad as this 7-inch line?

A. None of the 7-inch lines, but the 6-inch line might have been as bad.

Q. The 6-inch line might have been as bad?

A. Yes.

Q. None of the 7-inch lines were as bad?

A. No.

Q. Now, if that had been a good line, if this 7-inch line had been a good line—

A. (Intg.) That was 6-inch.

Q. 6-inch line; excuse me; if this 6-inch line that you got from the "Edith" had been a farly sound line, or a good line, you could have practically saved this damage, couldn't you?

A. I could have saved some damage, saved the blow, yes, but still she would have touched the wharf; she was then too close to the wharf.

Q. How many feet of line did you have out when the "Edith" stopped her engines and before any line was hauled in?

A. Before any of it was hauled in, I had about 25 fathoms out.

Q. How long were these good 7-inch lines of yours? A. 20 fathoms.

Q. 20 fathoms, with a 6-fathom pennant?

A. 6-fathom wire on.

Q. With a 6-fathom wire? A. Yes.

(Testimony of Emil A. Sandstrom.)

Q. Why couldn't you have passed the "Edith" one of your good 7-inch lines with the 6-fathom wire when you were under the bow here?

A. I didn't see any men while I was waiting under the bow there.

Q. You didn't see what?

A. I didn't see any men there.

Q. Did you hear the master of the "Edith" say "This is a bum tug, it has no lines"—I mean the mate of the "Edith"? A. No, I did not.

Q. Did you hear anything of that kind?

A. No, not there; only what transpired in the slip.

Q. I am talking about the time when you were right out in the stream. A. No. [269]

Q. You say you did not hear any argument there about furnishing a line? A. No.

Q. Do you know Mr. Kraatz—do you remember him? A. Yes.

Q. He was one of your deck-hands on that day?

A. He was a deck-hand at the time.

Q. As a matter of fact, he took the line off the bitts, didn't he? A. He did, yes.

Q. He was the one that held it?

A. He was the man that was holding onto it.

Q. And he says that he had to let go because the weight got too much for him.

A. It would naturally do that, the ship pulled away from him.

Q. He said he had to let go before the "Edith's" engines started, because the weight was too much for him? A. Not before it started.

(Testimony of Emil A. Sandstrom.)

Q. Then you say that is not correct?

A. That is not correct.

Q. And that when he says he let the line go before the wheel started he is mistaken?

A. He is mistaken, yes.

Q. You are sure of that? A. I am sure of that.

Q. Were you standing next to him when he let the line go? A. Sir?

Q. Were you standing next to him when he let the line go? A. I was standing on top of the house.

Q. Were you standing where you could see Kraatz? A. Yes.

Q. Did you see him? A. Yes.

Q. Were you looking at him when he let the line go? A. Yes.

Q. Did you see John Taylor there?

A. John Taylor?

Q. Yes. Do you know John Taylor?

A. He might have been a fireman.

Q. Do you think he was?

A. Most likely he was.

Q. Do you know that he was?

A. No, I don't remember the name.

Q. Do you remember the man?

A. No, I do not. [270]

Q. You remember the four lines that you had aboard, but you do not remember the crew that you had on that day?

A. I remember the crew I had, but I don't remember the names.

Q. Do you remember the man?

(Testimony of Emil A. Sandstrom.)

Mr. CAMPBELL.—He might not remember the name of the fireman.

Mr. SUTRO.—Do you remember the fireman?

A. Yes.

Q. Were you standing where you could see him?

A. I know we had two firemen.

Q. Were you standing where you could see him?

A. Yes.

Q. Was he standing right by Kraatz when the line went over?

A. I could not say he was just by him, but he was on the stern of the boat.

Q. Was he mistaken if he said that after the line went over they started the wheel of the "Edith"?

A. They started the wheel before the line went over.

Q. Then he was mistaken if he said they started the wheel after the line went over?

A. They started it again after it was stopped—

Q. (Intg.) Mr. Taylor said that working the ship did not pull the line out of the deck-hand's hands. Was he mistaken about that?

Mr. CAMPBELL.—We object to that as an improper line of cross-examination.

The COURT.—He is giving his version of it.

Mr. SUTRO.—I thought it only proper to call his attention to it. If it is not proper I will desist.

Mr. CAMPBELL.—It won't change his testimony,

Mr. SUTRO.—I don't know; it might; it might refresh his recollection considerably.

A. No, I don't remember the name of the fireman.

(Testimony of Emil A. Sandstrom.)

Q. Are you sure now that the "Edith's" engines were started before this line went over the side of the tug? A. Yes, I am sure. [271]

Q. You are willing to say that positively?

A. I am willing to swear on that.

Q. Were you standing where you could hear the mate ask for the 12-inch hawser?

A. Yes; we were in the slip then.

Q. No; that is as you recollect it. You did not hear the mate ask for the 12-inch hawser when you were somewhere near this position? A. No.

Q. Just before you got here? A. No.

Q. You did not hear anyone on your tug refuse to pass that hawser? A. No.

Q. You personally did not refuse to pass it?

A. I did not refuse to pass it because I was not asked for it there.

Q. I am asking only about the time before you got into this position here.

A. In fact, I think if they had asked me for the hawser in that position I would have been compelled to give it to them.

Q. You did not hear the mate say, "That is a bum tugboat, it has no lines"?

A. No, I did not hear that.

Q. Or anything of that kind?

A. Not out there.

Q. I am talking about out here, Captain.

A. No.

Q. I am talking about some position, in between the position opposite 44 and 34. A. No.

(Testimony of Emil A. Sandstrom.)

Q. That is all I am talking about. A. No.

Q. You heard no discussion of any kind there?

A. No.

Q. You say now positively that you were not asked for that hawser while you were out there in the stream? A. No, I was not, positively.

Q. And you say that the reason you did not pass up one of your own 7-inch lines was that you did not see any men on the forecastle-deck?

A. That is not the reason; because I was not asked for any of those 7-inch lines. [272]

Q. The reason you did not pass up a 7-inch line is because there were—

A. (Intg.) They did not ask me for it.

Q. They did not ask you for it?

A. They did not ask me for it.

Q. It is alleged in the answer here that the first officer of the steamship "Edith" asked the tug to pass a large 12-inch hawser. Do you know of whom that was asked?

A. No, I don't know anything about that.

Q. Of course, your 7-inch lines, particularly those which you say were in good condition, would have held the "Edith" and prevented this damage if you had passed on—if they had asked you for it and you had passed one to them: Isn't that so?

A. These 7-inch lines are too short to hand a ship under the bow; there would have been possibly 3 or 4 fathoms consumed in getting it passed and another 3 or 4 fathoms in getting it fast on the towing bitts, and the towboat would have no line to work on; I

(Testimony of Emil A. Sandstrom.)

would have been tied up right under the bow; I would have been helpless.

Q. In an emergency, a 26-fathom line would have been used to hold the "Edith" there, would it not—could have been used, if you had been asked for it?

A. Well, it could have been used, but whether it would have had any effect upon it I don't know.

Q. You were right under her bow?

A. I was right under her bow.

Q. When you were out from Pier 44 and the line was out at full length, there was only 25 fathoms between you, was there not?

A. About that; but that is between the ships.

Q. That is not allowing for—

A. (Intg.) Not allowing anything for making fast.

Q. Not allowing anything for making fast, and it is not allowing anything for wrapping around the bitts? A. No.

Q. But when you were out here opposite Pier 44 with the full length line, the length of line that you had was the amount that you [273] called for, was it not?

A. Well, I could have had more if I wanted.

Q. You did not want any more?

A. I did not want any more; I told them to make fast.

Q. You felt that was plenty of line?

A. That was the ordinary length, you know.

Q. 25 fathoms? A. About that, 25 fathoms.

Q. You were not getting right up to an emergency,

(Testimony of Emil A. Sandstrom.)

where you could do with the least possible amount of line; you had plenty of line?

A. I had what I thought would be enough.

Q. You had what you thought was enough. In other words, 25 fathoms from stern to stern, in your opinion, was a safe and proper amount of line to have? A. Yes, for that kind of work.

Q. Captain, from where you stood could you see the propeller of the "Edith"? A. Yes.

Q. It was partly out of the water, was it not?

A. Partly.

Q. She was light? A. Enough to be seen, yes.

Q. And you could observe whether it was turning or not turning? A. I could, readily.

Q. As a seaman, you would not approve of the starting of an engine while there was a 20 or 25-fathom line astern, would you, if there was such a condition? A. I do not understand you.

Q. You would not approve starting an engine if there was a 20 or 25-fathom line over the stern of the ship hanging in the water?

A. In what direction do you mean? Either direction?

Q. Yes.

A. Well, if the line was tight, it would not make any difference.

Q. If it was hanging in the water?

A. No, I would not approve of it.

Q. As a matter of fact, every seaman always has in mind keeping his wheel clear of a line that has been cast off, hasn't he? [274] A. Correct.

(Testimony of Emil A. Sandstrom.)

Q. And always aims so to operate that his wheel won't become foul when a line is cast off?

A. Correct.

Q. If, then, there is danger of the line fouling, he stops his engine, does he not until it is in?

A. Yes.

Q. That is good seamanship?

A. That is seamanship yes.

Q. Did you happen to notice whether this was a right-hand or left-hand propeller?

A. Right-hand propeller.

Q. And it was a single screw?

A. Single screw; I could only see one of them.

Q. Now, the line, you say, was a starboard line?

A. Yes.

Q. You are sure of that now?

A. I am sure of that.

Q. And if this were cast off, it would naturally hang under the counter of the ship, would it not?

A. Hang across the rudder of the ship.

Q. With a right-hand screw turning to the right, if the line were hanging in that position and the screw turning, it would be pretty apt to foul, would it not?

A. If he didn't back it would not foul, but if he backed it is apt to catch on either side if it hangs in the water.

Q. As a matter of fact, a line coming from the starboard, the screw turning to the right, in the direction which the line was hanging, the line hanging across the counter, do you call it, of the ship, would

(Testimony of Emil A. Sandstrom.)

be pretty sure to catch in the propeller, wouldn't it?

A. No, not necessarily.

Q. Very apt to?

A. Apt to if there was lots of line and no motion of the ship; but the ship dragging the line would naturally keep it clear.

Q. Suppose at the same time you not only had the line cast off of the starboard and a right-hand screw turning to the right, but you also had the ship drifting to the right, to the starboard, [275] wouldn't that be more apt to foul the line?

A. No because the line would be trailing to the windward of the ship. The turning of the propeller to the right would not have any tendency to catch the line any more than if it was turning the other way.

Q. Would not the turning of a propeller to the right have a tendency to suck in what was on the starboard side and throw out what was on the port?

A. If he was backing.

Q. If he was backing?

A. The suction of the water will pull the line in there.

Q. You did not have any line below deck, I believe you said, except one 6-inch line or one new 7-inch line? A. One new 7-inch line.

Q. Where were your heaving lines? Were they below deck? A. No; on deck.

Q. Were they fastened to these 7-inch lines?

A. No.

Q. Did you have any 7-inch lines with a heaving

(Testimony of Emil A. Sandstrom.)

line fastened to them? A. No.

Q. Was this 12-inch hawser a suitable line, in your opinion, for the performance of this maneuver?

A. Well, it could have been used; it would take a longer time to handle it.

Q. But was it of a character suitable for the purpose of performing this maneuver?

A. We seldom use it; it could be used.

Q. It is not the proper line for that maneuver?

A. Not the proper line for that work.

Q. When you left Pier 44 what line did you have that in your opinion was a suitable line for performing this turning maneuver, if you had any?

A. Well, the line I was pulling the ship out with from Pier 44.

Q. What line did you have on your tug?

A. The hawser.

Q. 12-inch hawser? A. Yes.

Q. That was a suitable line for that job?

A. That is a suitable line. **[276]**

Q. For that job?

A. Well, it is one that could have been used—not suitable, but could have been used.

Q. Did you have a suitable line for that job on your ship?

A. That is all the suitable line we require, a rope to pull on, that would hold to pull on.

Q. When you dropped this stern line here, did you advise the captain that you were going to go around his bow and pick up a bow-line from him?

A. No; I asked the captain, when I went along

(Testimony of Emil A. Sandstrom.)

his side, there, to give me a good bow-line.

Q. But that was after you got down toward Pier 36?

A. No, right away after I let go of the line.

Q. As soon as you let go of the line? A. Yes.

Q. Did you call out to the captain from where you were standing?

A. I ported my wheel and went around the ship, and as I went past the bridge I asked him to give me a good line.

Q. Did you pass the ship and come around again?

A. No, I went under the bow and stayed there.

Q. Will you show us where you first got under the bow of the ship, because this is the first time we have heard of this.

A. Can I move this?

Q. Yes. Just draw it, if you do not mind, Captain, where you were when you first got under the bow of the ship.

A. When I first got under the bow of the ship?

Q. Yes, where you first were *then* you asked him for a line.

A. I asked him for a line when I went by here. The ship was lying here then, when I went by her.

Q. That is when you first asked him for a line?

A. I came by here, you see.

Q. That is when you first asked him for a line?

A. When I first asked him for a line. [277]

Q. Where were you when you got the line?

A. Here is where I laid when I got the line.

Q. You are showing your first position about op-

(Testimony of Emil A. Sandstrom.)

posite Pier 42—about between 42 and 44. Is that where you want it?

A. That is about the position of the ship when I asked him for the line.

Q. When you first asked for the line?

A. Yes.

Q. When you first got the line you were opposite Pier 44?

A. There. By this time we were both drifting together.

Q. Toward Pier 44? A. That is correct.

Mr. SUTRO.—If your Honor will permit me to state this for the record, the position that the captain shows when he first asked for the line is with the "Edith" off the center between Piers 42 and 44, with the tug on the starboard side of the "Edith."

The WITNESS.—Correct.

Mr. SUTRO.—And about amidships.

The WITNESS.—Correct.

Mr. SUTRO.—And the "Edith"with her helm pointed in the direction of Pier 44.

The COURT.—Her stem?

Mr. SUTRO.—Her stem in the direction of Pier 44.

The WITNESS.—Correct.

Mr. CAMPBELL.—You said the tug was to the starboard of the "Edith."

Mr. SUTRO.—Yes, I think he meant that. This is the stern here, isn't it, Captain?

A. Yes, supposed to be.

Q. You would be to the starboard side?

(Testimony of Emil A. Sandstrom.)

A. Starboard side.

Q. Just about amidships.

The COURT.—Very shortly after that you laid alongside of the bow of the "Edith"?

A. As soon as I got under the bow I laid there all the time while he was drifting. [278]

Q. You drifted together from that position to where you say you got the line?

A. To where I got the line.

Q. How long did it take you to go that distance?

A. It was a long time, I imagined—possibly 8 minutes—6 or 7 minutes, somewhere around there.

Q. How long ought it to take two men to haul in that stern-line that you cast off, 25 fathoms?

A. It should not take very long.

Q. Roughly, how long?

A. In about 5 minutes.

Q. Why did you cast off there 700 feet away from the wharf?

A. Well, we cast off because I intended to come under the bow of the ship and get a bow-line and pull her around.

Q. Did you have room enough for that?

A. I had room enough; if I had got the line I would have had room enough.

Q. You made no investigation or inquiry to find out whether there was a line you could get?

A. I never went aboard the ship; I didn't know what they had there.

Q. You undertook that maneuver without finding out what they had aboard ship?

(Testimony of Emil A. Sandstrom.)

A. I took the captain's word for that.

Q. What did he tell you?

A. He told me to pull the ship out of the wharf, from the wharf.

Q. You didn't know what you were going to do, and you did not know what he was going to do?

A. No.

Mr. CAMPBELL.—The captain's testimony is that he relied upon the second mate as the go-between between these two men.

Mr. SUTRO.—I beg your pardon; that is not the captain's testimony.

Mr. CAMPBELL.—We will read it and see what it is.

The COURT.—You mean the master of the "Edith"?

Mr. SUTRO.—He says he relied on the captain of the tug after he cast his line off to take care of him. That is what [279] he said.

Mr. CAMPBELL.—We will read it to you and there will be no dispute.

Mr. SUTRO.—While you are looking that up we can go along, and when you have it you can read it.

Q. Now, Captain, getting back a minute to this 12-inch hawser, how many fathoms of pennant did you have on it? A. I had about 25.

Q. 25 fathoms of pennant? A. Yes.

Q. And that would be hauled up through the chocks. Is that what you call it? A. Yes.

Q. Is that an open space?

A. Yes, that is an open contrivance with two or

(Testimony of Emil A. Sandstrom.)

three different places for the line to lead through.

Q. What is the width, or diameter, rather, of one of these pennants? A. 1½ inch.

Q. What is the diameter of a 12-inch hawser?

A. You get pretty near it by figuring one-third of it; 4 inches.

Q. So that the thickness of the hawser, you say, is about 4 inches? A. About 4 inches.

Q. And the thickness of your pennant is about 1½ inches? A. 1½ inches.

Q. Now, the same chock through which you would pass that 4-inch hawser is also the chock through which you would pass the 1½-inch pennant, is it not?

A. Yes.

Q. There would not be very much friction, would there, in passing that 1½-inch pennant through the chock?

A. That depends on the height of the ship.

Q. There would not be nearly as much friction passing that through as there would be in passing this 12-inch hawser through, would there?

A. They could not get the 12-inch hawser through if [280] they tried without steam, not that amount of men.

Q. But, still, the 12-inch hawser is supposed to go through this chock, isn't it?

A. Well, not necessarily.

Q. But it would go through it, wouldn't it?

A. I suppose it would, yes.

Q. In other words, was not that chock amply big enough for the 1½-inch wire pennant to go through?

(Testimony of Emil A. Sandstrom.)

A. Yes.

Q. Plenty large enough; it was not a case of forcing it through? A. No.

The COURT.—I understood the captain's testimony with reference to friction to be not that the chock was so small that it would make friction on either side, but that the friction would be caused by the weight of the hawser on the lower edge of the chock.

Mr. SUTRO.—He said there would be too much friction to enable two or three me to pull it through.

The COURT.—I did not understand that in answer to that question that that was because they were trying to force a large hawser through a small opening, but because the weight of the hawser on the lower edge of the chock caused the friction.

Mr. SUTRO.—Your Honor understood him correctly; it is evident to me now; but I understood him to say there was too much friction, and thought he meant it would take a tremendous effort to force this wire pennant through the chock.

The COURT.—No.

Mr. SUTRO.—And yet the same chock will take an 8 or 10 or 12-inch hawser.

The WITNESS.—No.

Q. You mean the weight?

A. I mean the friction of the weight, hauling the wire up through that chock; naturally, you have to bend that wire on the chock, and the weight of it down in the lower [281] end would be too much for two or three men to haul that up.

(Testimony of Emil A. Sandstrom.)

Q. How many men do you think could haul it up?

A. I think about six men would be good.

Q. How many men were on the "Edith"?

A. That I don't know.

Q. There might have been six men there for all you know?

A. There might have been more; I don't know how many were there; but I know how many there were on the stern, that is all.

Q. We are talking about the bow, now, aren't we, Captain? Captain how high was the "Edith's" bow above the deck of the "Fearless," the forecastle? It has been testified to here that it was about—

Mr. CAMPBELL.—Let him testify.

A. From the house, or the deck?

Mr. SUTRO.—I am not surprised that you are a little sensitive about it.

Mr. CAMPBELL.—I am not sensitive about it in the least.

Mr. SUTRO.—About how high was the forecastle deck of the "Edith" above the deck of the tug?

A. Fully 20 feet.

Q. Would you say that was about right?

A. Possibly 23 feet—23 or 24 feet.

Q. Lloyd's register shows—will you take Lloyd's register figures as to the height of the forecastle?

Mr. CAMPBELL.—No, I will not.

Mr. SUTRO.—23 or 24 feet, you say? A. Yes.

Mr. CAMPBELL.—I don't think it gives that.

Mr. SUTRO.—They give the dimensions, the height of the ship.

(Testimony of Emil A. Sandstrom.)

Mr. CAMPBELL.—They give the moulded depth of the ship.

Mr. SUTRO.—How much draft did the "Edith" have that day?

A. She would draw very little, possibly 7 or 8 feet forward.

Mr. SUTRO.—The moulded depth of the "Edith" is given as [282] 25 feet 6 inches. Assuming that is the moulded depth of the "Edith," how much would you allow for the forecastle?

Mr. CAMPBELL.—What do you mean by "moulded depth," so that I can understand?

Mr. SUTRO.—As I understand it, the depth from the deck to the keel.

Mr. CAMPBELL.—Whereabouts?

Mr. SUTRO.—I am talking about the bow.

Mr. CAMPBELL.—The amidships section?

Mr. SUTRO.—These figures are taken for bow.

Mr. CAMPBELL.—I do not think so. How much sheer did that vessel have?

Mr. SUTRO.—If you will tell me what sheer means I will tell you.

Mr. CAMPBELL.—Go ahead, I won't interrupt you.

Mr. SUTRO.—Captain, as I understand you, you think that the forecastle deck was about 23 or 24 feet above the water? A. Above my deck.

Q. Above your deck? A. Yes.

Q. How high was your deck above the water?

A. About two feet.

Q. Any more?

(Testimony of Emil A. Sandstrom.)

A. A little more forward; a little less aft, possibly.

Q. How much more forward than aft?

A. Well, the sheer of the boat will be considerable; at the extreme bow of the boat it would be about 7 feet above water.

Q. You say that the deck of the "Fearless" was about two feet above the water?

A. Well, taking it about amidships; the after end of the house, it would be about two feet.

Q. So that the distance that this pennant would have to be hauled would be about 23 or 24 feet, you think? A. Yes, about that.

Q. That is only three feet more than we figure it, so it does [283] not make much difference. You say that the captain could have dropped his anchors at any time after he cleared the slips? A. Yes.

Q. As soon as you got into this position on his starboard side, where you asked him for a line, and from that time on until you got the line, you would not expect him would you—you would not expect to tow him with his anchors down, would you?

A. No, but he had no reason to tow with the anchor down.

Q. In that case, if he was expecting you to tow him, either gave you a line or got one from you, he would not drop his anchors, would he?

A. Well, he would drop his anchor before he got into trouble, wouldn't *it?*

Q. If he thought he was going to go into trouble, yes, I suppose he would; but if he expected you to either give him a line or if he expected to give you

(Testimony of Emil A. Sandstrom.)

one—in other words, if he expected to tow you, he wouldn't drop his anchors, would he?

Mr. CAMPBELL.—You are asking the captain to read the master's mind.

Mr. SUTRO.—I am asking him as a seaman.

A. I did not go there for him to tow me; I went to tow him.

Q. That is your answer to the question. Read the question.

(The last question repeated by the reporter.)

If he expected you to tow him; you are quite right; if he expected you to tow him, he would not drop his anchor, would he, as a good seaman?

A. Either that or give me a line—either drop an anchor or give me a line.

Q. Or get one from you?

A. Or get one from me; in either case it would have been better than to get in trouble.

Q. How long did it take you, Captain, to go around after the line had been cast off, to this position amidships of the "Edith"?

A. Possibly four minutes. [284]

Q. Four minutes? A. Three or four minutes.

Q. Three to four minutes? A. Yes.

Q. It took you three or four minutes to come from the stern of the "Edith" around on the starboard side until you were about amidships?

A. About that.

Q. Three or four minutes? A. Yes.

Q. In those three or four minutes she drifted from the position opposite Pier 44 to a position amidships

(Testimony of Emil A. Sandstrom.)

between 44 and 42? A. Yes.

Q. How long did it take her to drift to the position that you have marked here opposite Pier 34?

A. I didn't mark the time; I couldn't answer that.

Q. About how many feet do you think she drifted between the time that you left her stern and the time you got around to the starboard side?

A. She drifted pretty close to 1800 feet.

Q. You mean the entire time? A. Yes.

Q. But from the time that you left her stern until you got here amidships she only drifted 150 or 200 feet or so, didn't she? A. Something like that.

Q. That took four or five minutes?

A. About three or four minutes—not over four.

Q. Now, with these figures in mind, can you estimate the length of time that it took her to drift from the position between Piers 44 and 42 to this position at Pier 34?

A. I could not answer that; I don't know how long it took.

Q. It would take quite a long while, would it not?

A. I imagine I was there a long time.

Q. It must have been 20 minutes or half an hour?

A. No.

Q. It took her four minutes to drift from this position which I will mark "A" to the position "B."

A. You must remember a ship picks up way in drifting; she had not started, hardly, then. [285]

Q. So that it was because she picked up way that she started to drift faster: Is that it?

A. Drift faster, yes.

(Testimony of Emil A. Sandstrom.)

Q. When you cast off that stern line, you knew how much wind and tide there was, didn't you?

A. Yes, I knew.

Q. You knew that a ship drifting with that wind and tide would gather headway, didn't you?

A. Yes.

Q. And would keep drifting faster, and faster, and faster? A. Yes.

Q. And your idea, nevertheless, was to drop that line off the stern, run around and get one off the bow, and head her upstream?

A. My idea was to tow the ship further out; I would have towed her further out in the stream.

Q. How far would you have towed her out?

A. Possibly a thousand feet further; but when the captain stopped backing I came to the conclusion that he wanted me to let go; otherwise, he had no reason to stop backing; I could have kept on backing out into the stream.

Q. That was your judgment?

A. That was my idea of it.

Q. That was your idea of his conclusion?

A. Yes.

Q. Now if, in point of fact, his idea was that you should hang on to his stern, as he has testified, then your idea as to what he wanted was a mistaken idea: Was it not? A. It was confusion.

Mr. SUTRO.—That is all.

Redirect Examination.

Mr. CAMPBELL.—Q. How did the equipment which the "Fearless" had on this day compare with

(Testimony of Emil A. Sandstrom.)

the usual equipment carried on board the tugboats?

A. Well, it compared in every respect with whatever we used to carry on the tugboats.

Q. How did the "Sea King" compare in size with the "Fearless"? A. Exactly the same thing now.

Q. How did the "Sea King," I say, compare in size with the "Fearless"? A. The size? [286]

Q. Yes. A. Considerably.

Q. Which is the larger tug?

A. The "Sea King" is far the larger tug.

Q. What lines do you carry on the "Sea King"?

A. We carry the same lines, 4 7-inch lines, and at the present time I have got a spare one down below, new one.

Q. What is the largest sea-going tug that you have? A. The "Hercules."

Q. What lines does she carry?

A. She carries, I assume, the same lines; I could not swear to that.

Mr. CAMPBELL.—That is all.

Mr. SUTRO.—That is all.

Mr. CAMPBELL.—On that point I just want to read this testimony to the court. First I am reading from page 23 and then from page 30. This is cross-examination of the master of the ship, in a deposition taken in New York.

Mr. SUTRO.—I do not desire to interpose any objection to this, but I really think, in fairness to us, if those seven pages are going to be read—

Mr. CAMPBELL.—I am not going to read seven pages.

(Testimony of Emil A. Sandstrom.)

Mr. SUTRO.—I thought you said 23 to 30.

Mr. CAMPBELL.—No, on page 23 and page 30. The question was: "Q. Who owns this vessel that you are on now, the 'Helen'?

A. The Bull Insular Line, A. H. Bull & Company, Agents.

Q. You, yourself, made the engagement for this tug, did you over the telephone? A. Yes.

Q. It was not intended that the tug should do anything but assist you into the dock?

A. That was my intention.

Q. You did not intend that she should haul you out of the slip at all did you? A. No.

Q. You did not think you required the tugboat to haul you out of the slip, did you?

A. I did not." [287]

Then on page 29:

"Q. How much did the tug have out of that line, the second line?

A. I should judge in the neighborhood of 30 fathoms, along there.

Q. Who gave the signal to the tug that time to go ahead?

A. That time, you know, she was on Pier 44 and I told him to go ahead, waved my hand to the third officer and told the towboat to go ahead.

Q. You simply waved your hand? A. Well—

Q. Did you see them reply from the tug to that waving of yours?

A. No I could not see the tug then, she was away astern of me. I could not see the captain, I could see the stack.

(Testimony of Emil A. Sandstrom.)

Q. Why didn't you have some signal system or whistle system?

A. Well, I would have to find out if the captain knew what I was whistling about.

Q. At any rate, you didn't arrange any signals?

A. No.

Q. You depended on passing word by the second officer? A. By the second officer.

Now, I want to offer in evidence, with counsel's consent, a record of the Beaufort scale as it is published in Lloyd's calendar.

Mr. SUTRO.—What is the purpose of this?

Mr. CAMPBELL.—The purpose is this that your master testified on his direct examination that the wind was blowing at a velocity No. 8 of the Beaufort scale, and I want to reduce that to miles, so that the Court may have the advantage of it.

Mr. SUTRO.—I suggest that you state what it is according to the Beaufort scale, and you need not introduce the book in evidence unless you want to.

Mr. CAMPBELL.—I do not intend to put the book in evidence. The Beaufort scale, as set forth in Lloyd's calendar, No. 8 is a 48-mile breeze. We have these ropes here if you want to put them in evidence.

Mr. SUTRO.—No.

Mr. CAMPBELL.—That is our case.

Mr. SUTRO.—That is our case. [288]

Argument of Oscar Sutro, Esq.

I am not going to argue to your Honor that a case of this sort should go off on the pleadings, but the first thing that I would like to bring to your Honor's

attention is the discrepancy on material points between the answer in this case and the theory of the case as it has developed by the claimant.

I am totally surprised by the theory that was developed in the evidence, that this line was pulled out of mate Kraatz's hands by the forward movement of the engines. There are three or four admissions, if they may be called such, although I take them merely to be statements of fact in the answer upon which we relied both for the preparation of this case, and in the examination of our witnesses; we took those facts for granted, and they are these; they are contained in the answer. First, that immediately that the line was cast off a signal was given by the mate to the captain to stop his engines; as he obviously would have to do if he was not going to foul his propeller.

Second: That the first officer asked for a 12-inch hawser that was lying in the tugboat, and did not get it.

Now, your Honor just heard the captain testify. The answer specifically admits that the hawser was asked for and was not furnished; we naturally did not prepare for any proof on that subject, and the reason—

Mr. CAMPBELL.—You took the depositions of the master and your second officer.

Mr. SUTRO.—We saw no occasion, Mr. Campbell, for taking the depositions on points which the pleadings specifically admitted. And it is specifically admitted *in haec verba* that the first officer asked for a

large 12-inch hawser which was lying in the tug. [289] Now, the length of time that elapsed during which that hawser could have been passed to the "Edith" was made apparent in the testimony here, particularly this afternoon. But, above all, the reason which is assigned in the answer why that hawser was not passed up is that it was not a suitable hawser for the purpose, and they say it was too heavy for the men to handle. Now then, your Honor heard the testimony both ways on that subject. One of the witnesses said—two of the witnesses said that it was a perfectly suitable hawser, and one of them said that it was a perfectly unsuitable hawser; but the answer was that the line was not suitable for that purpose, and that left us in the position that the tug had no line suitable for the operation which it undertook. But the principal and most misleading, if I may use that word without offense, averment of the answer, in the preparation or presentation at least of our case is that this line was cast off after the engines were started abead. Now, the captain's deposition is perfectly consistent and clear that he undertook this maneuver; he intended to back out, he says; when he got out a distance which he estimated at 70 feet, or 30 or 40 or 50 feet, I forget just which, he stopped, he starboarded his helm and intended to return to the port; he was bound to; and he intended the tug not to let go but to hang on, and the tug, instead of hanging on, cast the line off after his engines were stopped. There was only one thing for him to do and that was to stop his engines, so that it would not foul the wheel, and he could not stop in time, your

Honor as the testimony here is that the wheel was fouled.

Now, these witnesses, some of them, state that the line was pulled out of the mate's hands; some of them state that he could not hold it because it was too heavy and one of them stated that the movement of the ship had nothing to do with it because the line was let [290] go after the wheel was started. The answer states that the wheel was started and the line was then cast off. Now, if that is true, and if that statement of the answer, which we submit has not been explained here and if we are entitled to that as an admission of fact in this case, then we submit that this tug was *prima facie* negligent because they had no right under their own testimony to cast off a stern line with a propeller turning in the water, particularly when that stern line came from the starboard side of the propeller was a right-hand wheel.

I did not offer your Honor any expert testimony in this case, although there was expert testimony at hand, for the reason that it seems to me a perfectly common sense fact which must be apparent to anyone, that if you drop a line over a moving propeller, you are going to foul that propeller.

Under the pleadings as they stand in this case and under the absolute conflict of testimony on the part of claimant's witnesses, taken in connection with the purposely consistent testimony on that point at least of our witnesses that this line was cast off after the wheel had started to turn, so that they immediately had to stop it and could not stop it in time, I submit we are entitled to a finding in this case that that wheel was fouled by reason of the fact that the

line was cast off after the wheel had started to turn forward.

It is entirely unnecessary for us to defend the propriety of the captain turning that wheel forward or turning his bow to the left. That was his funeral; if he chose to attempt to maneuver that way he took the responsibility for it. But certainly, whether the opinion of these experts who have taken the stand here—and they happen to be the manager, the superintendent, the assistant superintendent and one of the captains of the company—whether the testimony of those experts that this maneuver could or could [291] not be performed is correct certain it is and it cannot be contradicted that the maneuver unquestionably became impossible when the captain's wheel was fouled; and it was fouled because the captain of the tug took it upon himself to say that he should cast off the line because the captain of the "Edith" was going forward or had stopped his engines. It may be or it may not be, and I do not think it is necessary to a finding in this case that this maneuver could not have been performed. But we all know that if it could be performed in the absence of wind and tide, it could not be performed if a wheel was fouled. And they certainly fouled his wheel, because your Honor has their testimony. And I think the captain of the "Edith" is entitled to the benefit in this case of a finding that his wheel having been fouled, the maneuver became impossible, whether it was possible otherwise or not.

There is one more averment in the answer which is directly in the teeth of the testimony which the

claimants have produced and which I think we are entitled to the benefit of under these circumstances, and that is that the maneuver which was attempted was to pull the "Edith" out, drop the line, run around the bow, pick up her bow-line, and that it would have been successfully performed had a good line been passed. And they say that is the only way it could have been done. That is the averment of the answer.

Now, then, if your Honor please, we say at best it is a very hazardous and risky maneuver. The captain in his deposition testifies that he had nothing of that kind in mind. The captain of the "Fearless" says there was confusion; he had that maneuver in mind. If the captain of the "Fearless" undertook a maneuver without consulting the "Edith" as hazardous as that was, I respectfully submit he should have undertaken it fully equipped, fully [292] prepared and above all after consultation with the captain.

There is one decision that I have been able to find in the books that is so parallel to this case, and the language of it I think so apt, that I would like to call your Honor's attention to it at this time, even if we do file briefs; and I do not know that your Honor cares for them. It is the M. A. Lennox, 16 Fed. Cases, page 540, case 8987. That was a case where the "M. A. Lennox" undertook to tow the "Corsica." Now I can hear counsel say to your Honor the "Corsica" did not have her own power and consequently the case is not in point. But bear in mind if your Honor please this maneuver inevitably

contemplated that the "Edith" did get into a position where she would have no power; this maneuver contemplated dropping the stern-line, which meant stopping your engine, and from that moment the "Edith" was without power until the tug gets around here and picks her up. They say she should have backed and kept away from these piers, but that if your Honor please is emergency work. The maneuver itself meant, we will drop you her stern line, you will stop your engines, you will be without power and we will pick you up at your bow. That is just what they did in the "M. A. Lennox" case, or tried to do. It says here,—"she accordingly made fast to a hawser which was put out from the ship's quarter, and so hauled the ship out of the slip stern foremost. The ship was then towed a certain distance out into the river, stern foremost, and then the tug stopped, cast off the hawser, and attempted to get alongside of the ship, to take a second hawser from her starboard bow, in order to tow her upon her hawser to her place of destination."

And on page 541:

"The sternway of the ship, and her distance out in the river at the time the hawser was cast off by the tug, proved to be such that, before the tug got hold of the ship by the [293] second hawser, and acquired headway, the tide, which runs up past the Brooklyn piers at that time and place, carried the ship upon one of the Brooklyn piers, known as Wetmore's dock, whereby her rudder was injured, and the damages sued for sustained.

It is manifest from this statement, that, whatever

other negligence there might have been on this occasion, it was negligence to take this large ship so far out into the river with the stern hawser, and that this negligence was a cause of the disaster which followed. Evidence has been introduced to show that the failure of the hands on the ship to promptly catch the heaving-lines which were thrown from the tug after the stern hawser was dropped, by means of which the second hawser was to be taken on board the tug, prevented the tug from getting hold of the ship by the bow hawser, in time to keep her off the piers; but if this be so, still it was negligence to take the ship so near to the Brooklyn side that a failure to catch the heaving-line at the first or second throw would result in her striking the piers."

"It was a manoeuvre not unattended with risk, but which could have been accomplished by the exercise of care and skill, and it manifestly required for its successful accomplishment that the stern hawser should be cast off at the earliest possible moment. But, instead of dropping the hawser as soon as the ship was clear of the New York piers, the tug kept towing until the ship was two-thirds of the way over to Brooklyn, and where the ordinary mishap of failing to catch a heaving-line resulted in placing her upon the Brooklyn piers. It was the duty of the master of the tug to determine the distance he would require for his manoeuvre, i. e., to stop, drop the stern hawser, turn his boat, and make fast to the bow-line.

Ordinary prudence required the hawser to be dropped at the earliest moment after the ship had

fairly cleared the New York [294] piers; and I find nothing in the evidence which justifies the tug in holding on, as she did, until the ship was in a position of danger; for a ship cannot be considered as otherwise than in danger when she is drifting towards piers, and so near as to require not only great diligence but good fortune to prevent her from striking. I hold the tug, therefore, to be responsible for lack of proper care in taking the ship so far out into the stream before she dropped the hawser. In arriving at this conclusion, I have not overlooked the defense which has been sought to be rested upon the evidence tending to show that the ship was being transported under the direction of her own master, and that, in point of fact, the master of the tug acted under the direction of the master of the ship in determining the distance out to which the ship was taken. A careful consideration of the testimony given by the various witnesses has convinced me that there was nothing in the action of the master of the ship, on this occasion, which can absolve the master of the tug from the responsibility of a negligent performance of the manoeuvre which he undertook. It is true that the master of the ship was on board the ship, and gave some orders in regard to the hauling of the ship as she was coming out of the dock, but I am satisfied of the correctness of the master's statement that he told the tug to drop hawser as soon as the ship was clear of the New York piers, and nothing occurred which would warrant the captain of the tug in supposing that the master of the ship had undertaken to say how far out the tug should

go before turning to take the bow-line, or had in any way made himself responsible for the nearness of his ship to the Brooklyn piers at the time the tug stopped towing. The manoeuvre of shifting the position of the tug from that of towing by the stern hawser to that of towing ahead was a manoeuvre which the [295] master of the tug knew he would be obliged to perform when he took hold of the stern-line. If not responsible for the mode of taking the ship out upon such a line, which was clearly improper, he is certainly responsible for any want of due care and skill displayed in making the necessary change of his position, and such want of care is shown in his taking the ship so far out into the stream before he stopped towing."

Now, I say that just as in that case, so here, when the master of the "Fearless" undertook this ticklish maneuver he undertook the responsibility of carrying it out. There is not any claim made by anybody, either on the libelant or the claimants' side that the master of the "Edith" had any such maneuver as this in mind. There is nothing of the kind anywhere in the record. The only mind that conceived this maneuver was the mind of the master of the "Fearless." It might have been a perfectly good maneuver—Captain Gray said it was a safe maneuver; he said it was as safe a maneuver as the other one would have been, of making a big turn. But the fact remains that the master of the "Fearless" undertook it, and he did not, in the language of the street, get away with it. Now, the maneuver which the master of the "Edith" wanted done they say

was an impossible one; and even if it was, when they said to him silently and in their own mind, we won't do what you want us to, because we don't think it can be done, we will do what we think should be done, from that moment, if their plan was the better plan, they assumed responsibility for the movement of that ship.

There is just one word more. I am not going to trespass upon your Honor's patience, although I could talk a long time about this case—I particularly ask your Honor to bear in mind, I not having had the opportunity to develop it by the presence of [296] witnesses in court, that the master takes the position and correctly so, that so far as he is concerned this disaster was caused by the casting off of this stern line at a time when he had not ordered it cast off; in other words, his wheel was fouled or he thought it was fouled, which was the same thing—because he had to act according to his judgment—and he stopped his wheel. And although afterwards, when he got opposite Pier 32, he proceeded up to Hunter's Point on his own steam, he did not know but what the next turn of his wheel would foul that rope; and he stopped it just as quick as he could; and it was only after the disaster had happened and he knew no further damage could happen, that he tried his engines and they worked. But how did they work? Your Honor has seen the model here that there were a dozen or three or four turns—I don't know how many turns—around the propeller, showing that he was justified in believing that his wheel was fouled; to all intents and purposes in his

mind his wheel was stopped, and drifted. They say, why didn't you cast your anchors? Well, he didn't cast any anchors because the tug was coming around asking him for a line, and he was entitled to assume that a line would be passed; and if he had dropped his anchor he would have killed that maneuver, and he very properly did not drop his anchor, and when he got down here, where the first emergency line that they could get hold of was passed out, when the line broke he could not cast his anchor because all the witnesses, even those that have been most hostile to us have agreed on this point, that he could not drop his anchor without smashing up against the piers. So there was no stage in this entire maneuver at which he could properly drop an anchor.

And the same holds true of reversing his engines. I think one of the witnesses said, although the captain of the "Fearless" [297] denies it—one of the witnesses says that the captain of the "Fearless" called out to the mate of the "Edith" to back his engines; he could not back his engines, one of the witnesses said—the captain of the "Edith" said he could not. Why couldn't he? Because in his mind his wheel was fouled; and the only thing therefore that he could do of his own volition, he was blocked from doing by the dropping of that line at a time when he had not ordered it to be dropped, and he had to rely on the tug to render him the assistance. And I say if your Honor please, that any tug proposing to take a vessel out of a slip, to drop her stern line, to run around her bow, and pick up her bow line, which neither tells the master of the

vessel that it is going to do that, nor is prepared itself to do so, because it has no suitable line, is guilty, I respectfully submit of the grossest negligence. If he had a line of his own he should have used it, and if he did not have one he should have told the master to get one ready.

[Endorsed]: Filed Jun. 7, 1917. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [298]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 16,031.

A. H. BULL & COMPANY, INC., a Corporation, Libelant,

vs.

THE AMERICAN STEAM TUG "FEARLESS," Her Boilers, Engines, Tackle, Apparel and Furniture, Respondent.

(Order that Decree be Entered in Favor of Libelant, and Referring Cause to U. S. Commissioner to Ascertain Damage.)

MEMORANDUM.

Lacking the time to prepare an opinion in this case, I can only state my conclusions from the testimony as follows:

1. The master of the "Fearless" was at fault in not consulting with the master of the "Edith" as to

the maneuvers intended by him before he undertook to execute them.

2. He was also at fault in casting off the line without warning and while the "Edith's" wheels were turning.

3. To these faults the accident was due.

4. The "Fearless" should have passed to the "Edith," after letting go of her and while she was drifting, a line of sufficient strength to hold her, and should have been prepared to do so. This was not done.

5. The "Edith" was not at fault for not dropping her anchor, as she was entitled to believe that the "Fearless" would care for her properly.

A decree will be entered fixing the responsibility of the "Fearless," and referring the cause to the Master to ascertain and report the amount of damage suffered by the "Edith."

M. T. DOOLING, Judge.

[Endorsed]: Filed Feb. 8, 1918. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [299]

In the Southern Division of the District Court of the United States, for the Northern District of California, First Division. In Admiralty. Held at the Courtroom Thereof in the United States Postoffice Building, in the City and County of San Francisco, State of California, on February 8, 1918. Present: Hon. M. T. DOOLING, District Judge.

No. 16,031.

A. H. BULL & COMPANY, INC., a Corporation,
Libelant,

vs.

THE AMERICAN STEAM TUG "FEARLESS," Her Boilers, Engines, Tackle, Apparel and Furniture,
Respondent,

SHIPOWNERS & MERCHANTS' TUGBOAT COMPANY, a Corporation,
Claimant.

Interlocutory Decree.

The above-entitled cause having been heard on the pleadings and proofs, and argued and submitted by the proctors for the respective parties, and due deliberation having been had in the premises, and the Court having found that the injury and damage to libelant's vessel, the "Edith," was due to the fault of The American Steamtug "Fearless," the respondent herein, and that there was no fault on the part of the libelant's vessel the "Edith":

It is now ORDERED, ADJUDGED AND DECREED by the Court that the libelant above named do have and recover from The American Steamtug "Fearless," her boilers, engines, tackle, apparel and furniture, the entire damage sustained by the said libelant by reason of the matters and things set forth in the libel on file in the cause above named, together with interest and costs herein.

It is further ORDERED that the said cause be referred to Francis Krull, United States Commissioner, to take testimony and ascertain the amount of said damage, and report the same to this Court with all convenient speed. **[300]**

Dated: February 13, 1918.

M. T. DOOLING,
Judge of Said Court.

[Endorsed]: Filed Feb. 13, 1918. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

Entered in vol. 7, Judg. and Decrees at page 478. **[301]**

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,031.

A. H. BULL & COMPANY, INC., a Corporation,
Libelant,

vs.

THE AMERICAN STEAM TUG "FEARLESS," Her Boilers, Engines, Tackle, Apparel and Furniture,
Respondent,

SHIPOWNERS & MERCHANTS' TUGBOAT COMPANY, a Corporation,
Claimant.

Stipulation as to Damages.

The interlocutory decree herein having ordered

that the case be referred to Francis Krull, United States Commissioner, to take testimony and ascertain the amount of the damage sustained by the libelant and report the same to the Court, but the parties hereto being agreed upon said damage;

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto that the damage sustained by the libelant by reason of the matters and things set forth in the libel on file herein is the sum of twenty-one thousand seven hundred and forty-seven and 96/100 (21,747.96) dollars with interest at the rate of six (6) per cent. per annum from May 18, 1916.

OSCAR SUTRO,
PILLSBURY, MADISON & SUTRO,
Proctors for Libelant.

IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
Proctors for Respondent and Claimant.

Let it be filed.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Mar. 25, 1918, W. B. Maling, Clerk. By T. L. Baldwin, Deputy Clerk. [302]

In the Southern Division of the District Court of the United States, for the Northern District of California, First Division. In Admiralty. Held at the Courtroom Thereof in the United States Postoffice Building, in the City and County of San Francisco, State of Califorina, on March 28th, 1918. Present: Hon. M. T. DOOLING, District Judge.

No. 16,031.

A. H. BULL & COMPANY, INC., a Corporation,
Libelant,

vs.

THE AMERICAN STEAM TUG "FEARLESS," Her Boilers, Engines, Tackle, Apparel and Furniture,
Respondent,

SHIPOWNERS & MERCHANTS' TUGBOAT COMPANY, a Corporation,
Claimant.

Final Decree.

An interlocutory decree having been heretofore on the 13th day of February, 1918, signed and filed in the above-entitled cause, wherein it was adjudged that the injury and damage to libelant's vessel, the "Edith," was due to the fault of the American Steamtug "Fearless," the respondent herein, and that there was no fault on the part of the libelant's vessel, the "Edith," and whereby it was ordered that said cause be referred to Francis Krull, United

States Commissioner, to take testimony and ascertain the amount of said damage;

And the proctors for the respective parties to said cause subsequent to the signing and filing of said interloctuory decree, having entered into a stipulation as to the amount of said damages, as follows, to wit:

> "The interlocutory decree herein having ordered that the cause be referred to Francis Krull, United States Commissioner, to take testimony and ascertain the amount of the damage sustained by the libelant and report the same to the court, but the parties hereto being agreed upon said damage; [303]
>
> NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto that the damage sustained by the libelant by reason of the matters and things set forth in the libel on file herein is the sum of twenty-one thousand seven hundred and forty-seven and 96/100 (21,747.96) dollars with interest at the rate of six (6) per cent per annum from May 18, 1916."

And it appearing that the American Steam Tug "Fearless," her engines, boilers, tackle, apparel and furniture, respondent herein, was released by the claimant above named from the custody of the Marshal upon a stipulation for value.

NOW, THEREFORE, it is ORDERED, ADJUDGED AND DECREED that A. H. Bull & Company, Inc., a corporation, libelant, do have and recover from the American Steam Tug "Fearless,"

her engines, boilers, tackle, apparel and furniture, the sum of twenty-one thousand seven hundred and forty-seven and 96/100 dollars ($21,747.96), together with interest at the rate of six (6) per cent per annum from May 18, 1916, until paid, and costs as taxed.

And it is further ORDERED, ADJUDGED AND DECREED that unless this decree be satisfied or proceedings thereon, including execution, be stayed on appeal, within the time and in the manner prescribed by the rules and practice of this Court, the stipulators for costs and value, on the part of the respondent vessel, cause the engagements of their stipulations to be performed or show cause within the time prescribed by law why execution should not issue against them to satisfy this decree.

Dated March 28th, 1918.

M. T. DOOLING,
Judge.

Receipt of a copy of final decree is hereby admitted this 21st day of March, 1918.

IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
Proctors for Claimant.

[Endorsed]: Filed Mar. 28, 1918. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. **[304]**

In the Southern Division of the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,031.

A. H. BULL & COMPANY, INC., a Corporation,
Libelant,

vs.

THE AMERICAN STEAM TUG "FEARLESS," Her Boilers, Engines, Tackle, Apparel and Furniture,
Respondent,

SHIPOWNERS & MERCHANTS' TUGBOAT COMPANY, a Corporation,
Claimant.

Notice of Appeal.

To the Clerk of the Above-entitled Court, to the Libelant Above-named, and to Messrs. Pillsbury, Madison & Sutro and Oscar Sutro, Esq., Proctors for Said Libelant:

You and each of you will please hereby take notice that Shipowners and Merchants' Tugboat Company, a corporation, claimant above named, hereby appeals from the final decree made and entered herein in this cause on the 28th day of March, 1918, to the next United States Circuit Court of Appeals for the Ninth Circuit to be holden in and for the said circuit at the City and County of San Francisco, State of California.

Dated: April 6, 1918.

IRA S. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
Proctors for Claimant.

Receipt of a copy is hereby admitted this 6th day of April, 1918.

PILLSBURY, MADISON & SUTRO,
Proctors for Libelant.

[Endorsed]: Filed Apr. 8, 1918. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. **[305]**

In the Southern Division of the United States District Court, for the Northern District of California, First Division, in Admiralty.

No. 16,031.

A. H. BULL & COMPANY, INC., a Corporation,
Libelant,

vs.

THE AMERICAN STEAM TUG "FEARLESS," Her Boilers, Engines, Tackle, Apparel and Furniture,
Respondent,

SHIPOWNERS & MERCHANTS' TUGBOAT COMPANY, a Corporation,
Claimant.

Assignments of Error.

Comes now Shipowners and Merchants' Tugboat Company, a corporation, claimant and appellant herein, and contends that in the record, opinion

(memorandum of conclusions), decision and final decree in this cause there is manifest and material error, and said appellant now makes, files and presents the following assignments of error on which it relies, to wit:

(1) That the District Court erred in rendering and entering the interlocutory decree herein dated February 13, 1918.

(2) That the District Court erred in rendering and entering the final decree herein dated March 28, 1918.

(3) That the District Court erred in not dismissing the libel herein with costs to claimant as prayed for in claimant's answer and in not granting to claimant a decree of dismissal herein with its costs as so prayed for. [306]

(4) That the District Court erred in holding, deciding and decreeing that the injury and damage to libelant's vessel, the "Edith," was due to the fault of the American Steamtug "Fearless," the respondent herein, and that there was no fault on the part of the libelant's vessel, the "Edith."

(5) That the District Court erred in not holding, deciding and decreeing that the collision of libelant's vessel, the "Edith," with Pier 32 and the injury and damage to libelant's said vessel were solely due to the fault and negligence of libelant and its said vessel.

(6) That the District Court erred in not holding, deciding and decreeing that the collision of libelant's vessel, the "Edith," with said Pier 32 and the injury and damage to libelant's vessel, if due

to the fault and negligence of the "Fearless," were, nevertheless, proximately due to the contributory negligence of the "Edith."

(7) That the District Court erred in holding and deciding that the master of the "Fearless" was at fault in not consulting with the master of the "Edith" as to the maneuvers intended by him before he undertook to execute them.

(8) That the District Court erred in holding and deciding that the master of the "Fearless" was at fault in casting off the line without warning and while the "Edith's" wheels were turning.

(9) That the District Court erred in holding, deciding and finding that the master of the "Fearless" cast off the line without warning and while the "Edith's" wheels were turning. [307]

(10) That the District Court erred in holding and deciding that the accident was due to the alleged faults of the master of the "Fearless" in not consulting with the master of the "Edith" as to the maneuvers intended by him before he undertook to execute them and in casting off the line without warning and while the "Edith's" wheels were turning.

(11) That the District Court erred in holding and deciding that the "Fearless" should have passed to the "Edith," after letting go of her and while she was drifting, a line of sufficient strength to hold her and should have been prepared to do so; and in holding and deciding that there was any duty upon the part of the "Fearless" to pass a line to the "Edith" at all.

(12) That the District Court erred in holding and deciding that the "Edith" was not in fault for not dropping her anchor.

(13) That the District Court erred in holding and deciding that the "Edith" was entitled to believe that the "Fearless" would care for her without co-operation from the "Edith" by the latter's dropping her anchor.

(14) That the District Court erred in holding and deciding that a decree should be entered fixing the responsibility of the "Fearless" for the accident and in not holding and deciding that a decree should be entered fixing the responsibility of the "Edith" for the accident and dismissing the libel accordingly.

(15) The District Court erred in not holding and deciding that if there was negligence and fault upon the part of the "Fearless," nevertheless, there was contributory negligence on the part of the "Edith" proximately causing said accident and the injury and damage to the "Edith" flowing therefrom. **[308]**

(16) That the District Court erred in not holding, deciding and decreeing that said accident and the injury and damage to the "Edith" were due to the failure of the master of the "Edith" to anchor her on "thinking" his steamer disabled by the line in her wheel.

(17) That the District Court erred in not holding, deciding and decreeing that said accident and the injury and damage to the "Edith" were due to the failure of the first mate of the "Edith" to pass

promptly a good line to the "Fearless" when she was drifting toward Pier 32.

(18) That the District Court erred in not holding, deciding and decreeing that the said accident and the injury and damage t the "Edith" were due to the failure of the master of the "Edith" to go astern on the "Edith's" engines instead of allowing her to drift so close to Pier 32 before backing that she could not get away from it before colliding.

(19) That the District Court erred in not holding, deciding and decreeing that the safe and proper way for the "Edith" to get to Hunter's Point under the conditions of wind and tide then prevailing was for her (after backing out from Pier 44, aided from the stern as she was by the "Fearless," and after getting well into the stream) to take in her line and then go ahead under her own power under a port helm, so that she would be headed northward with the wind and tide, and then to make a half circle easterly toward the south, so as to take her course in a general southerly direction toward Hunter's Point; and in not holding, deciding and decreeing that it was negligence on the part of the master of said "Edith" to go ahead on her propeller, as she did, without first taking in her line, [309] and, also, that it was negligence on her part, when she did go ahead on her propeller, to do so, as she did, under a starboard instead of under a port helm, thus making it necessary for the "Fearless" to attempt the difficult maneuver of circling around the "Edith's" stern and coming up under her bow and attempting to get a line from her bow so as to pull

her into the wind and tide and thus head her southward toward Hunter's Point; and in not holding, deciding and decreeing that the accident and the resulting injury and damage to the "Edith" were due to the negligence and fault of the "Edith" herself in compelling the "Fearless" to undertake said difficult maneuver when the safer course would have been that first outlined above.

(20) The District Court erred in not holding, deciding and decreeing that the "Edith" had her own power, that this was an "assist" and not a "towage" and that the duties and responsibilities of the "Fearless" were those of an assisting and not of a towing vessel.

(21) That the District Court erred in not holding, deciding and decreeing that the stopping of the propeller of the "Edith" was a signal to the "Fearless" to cast off the line.

(22) That the District Court erred in not holding, deciding and decreeing that the line was not taken off the bitts on the "Fearless" until the "Edith" had stopped her propeller, thereby indicating to the "Fearless" that said line was to be cast off.

(23) That the District Court erred in not holding, deciding and decreeing that the "Edith" was negligent in moving her propeller before taking in the line after it had been cast **[310]** off by the "Fearless" in response to the request that it be so cast off as conveyed to the "Fearless" by the stopping of the propeller of the "Edith."

(24) That the District Court erred in not hold-

ing, deciding and decreeing that the fouling of the "Edith's" propeller by the line, if there was such fouling, was due to the negligence and fault of the "Edith" in moving her propeller before the line had been taken in.

(25) That the District Court erred in not holding, deciding and decreeing that the line if wrapped round the "Edith's" propeller did not, nevertheless, interfere with the movement of said propeller.

(26) That the District Court erred in not holding, deciding and decreeing that there was no evidence to show that the line which was found on the "Edith's" propeller when she was docked at Hunter's Point fouled said propeller during the maneuver and was not there prior to the "Edith's" leaving her dock.

(27) That the District Court erred in not holding, deciding and decreeing that it was the duty of the "Edith" and not the duty of the "Fearless" to furnish the lines and all the lines required in the maneuver.

In order that the foregoing assignments of error may be and appear of record, said appellant files and presents the same and prays that such disposition be made thereof as shall be in accordance with the law and the statutes of the United States in such cases made and provided; and said appellant prays that the decree hertofore made and entered herein and appealed from may be reversed.

McCUTCHEN, OLNEY, & WILLARD,
Proctors for Appellant.

[Endorsed]: Copy received of the within Assignment of Errors and receipt of a copy is hereby admitted this 26th day of June, 1918. Pillsbury, Madison and Sutro, Proctors for Libelant. Filed Jun. 26, 1918. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. **[311]**

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,031.

A. H. BULL & COMPANY, INC., a Corporation,
Libelant,

vs.

THE AMERICAN STEAM TUG "FEARLESS," Her Boilers, Engines, Tackle, Apparel and Furniture,
Respondent,

SHIPOWNERS AND MERCHANTS' TUGBOAT COMPANY, a Corporation,
Claimant.

Cost Bond on Appeal and Staying Execution.

KNOW ALL MEN BY THESE PRESENTS: That we, Shipowners and Merchants' Tugboat Company, a corporation organized and existing under and by virtue of the laws of the State of California, claimant above named, as principal, and W. J. Gray and John W. Curry, of the city and county of San Francisco, State of California, and city of Oakland,

county of Alameda, State of California, respectively, as sureties, are held and firmly bound unto A. H. Bull & Company, Inc., a corporation, libelant herein, in the sum of two hundred and fifty (250) dollars, and in the further sum of twenty-five hundred (2500) dollars, to be paid unto said libelant, for the payment of which well and truly to be made, we bind ourselves, and each of us, our, and each of our, respective successors, heirs, executors and administrators, jointly and **[312]** severally firmly by these presents.

Sealed with our seals and dated this 6th day of April, 1918.

WHEREAS, Shipowners and Merchants' Tugboat Company, a corporation, claimant above named, has appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the decree of the United States District Court in and for the Southern Division of the Northern District of California, made and entered herein on the 28th day of March, 1918, ordering that said libelant do have and recover from the American Steam Tug "Fearless," respondent herein, the sum of $21,747.96, together with interest at the rate of six (6) per cent per annum from May 18, 1916, until paid and costs as taxed, and that, unless said decree should be satisfied or proceedings thereon, including execution, be stayed on appeal within the time and in the manner prescribed by the rules and practice of this Court, the stipulators for costs and value on the part of said respondent vessel should cause the engagements of their stipulations to be performed or show cause within the time pre-

scribed by law why execution should not issue against them to satisfy said decree; and,

WHEREAS, said claimant desires during the proces of such appeal to stay the execution of the said decree of said United States District Court;

NOW, THEREFORE, the condition of this obligation is such that if said Shipowners and Merchants' Tugboat Company, a corporation, shall prosecute said appeal with effect and pay all costs that may be awarded against it as appellant, if the appeal be not sustained, and shall abide by and perform whatever decree may be entered against it in this cause by the United States Circuit Court of Appeals for the Ninth Circuit, **[313]** or on the mandate of said court by the said District Court below, then this obligation to be void; otherwise the same to be and remain in full force and effect.

SHIPOWNERS AND MERCHANTS' TUGBOAT COMPANY,
By W. J. GRAY,
Its Vice-president.
(As Principal),
W. J. GRAY,
JOHN W. CURRY,
(As Sureties.)

(To be Acknowledged Before a Notary Public.)

State of California,
City and County of San Francisco,—ss.

On this 6th day of April, in the year one thousand nine hundred and eighteen, before me, M. I. Lawrence, a Notary Public in and for the said city and county of San Francisco, residing therein, duly com-

missioned and sworn, personally appeared W. J. Gray, known to me to be the vice-president of the Shipowners and Merchants' Tugboat Company, the Corporation described in and that executed the within and annexed instrument, and also known to me to be the person who executed it on behalf of the corporation therein named, and he acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office in the City and County of San Francisco, the day and year in this certificate first above written..

[Seal] M. I. LAWRENCE,
Notary Public, in and for the City and County of San Francisco, State of California.
My Commission Expires January 27, 1922. **[314]**

State of California,
City and County of San Francisco,—ss.

On this 6th day of April, in the year one thousand nine hundred and eighteen, before me, M. I. Lawrence, a Notary Public in and for the said city and county of San Francisco, residing therein, duly commissioned and sworn, personally appeared W. J. Gray and John W. Curry, known to me to be the persons described in, whose names are subscribed to and who executed the within and annexed instrument, and they severally acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office in the City and County of San Francisco, the day and

year in this certificate first above written.

[Seal] M. I. LAWRENCE,

Notary Public in and for the City and County of San Francisco, State of California.

My commission expires January 27, 1922. **[315]**

State of California,

City and County of San Francisco,—ss.

W. J. Gray and John W. Curry, being severally duly sworn, each deposes and says:

That he resides in the State and Northern District of California and that he is worth double the amount of the foregoing bond over and above all his just debts and liabilities.

W. J. GRAY,

JOHN W. CURRY.

Subscribed and sworn to before me this 6th day of April, A. D. 1918.

M. I. LAWRENCE,

Notary Public in and for the City and County of San Francisco, State of California.

The foregoing cost and supersedeas bond is hereby approved as to form, amount and sufficiency of surety this 6th day of April, 1918.

OSCAR SUTRO,

PILLSBURY, MADISON & SUTRO,

Proctors for Libelant.

The foregoing cost and supersedeas bond is hereby allowed and approved this 6th day of April, 1918, and the same may operate as a stay of execution in said cause pending the determination of said appeal.

_____,

Judge.

[Endorsed]: Service of the within Bond and receipt of a copy is hereby admitted this 6th day of April, 1918. Filed Apr. 6, 1918. W. B. Maling, Clerk. C. W. Calbreath, Deputy Clerk.

OSCAR SUTRO,
PILLSBURY, MADISON & SUTRO,
Proctors for Libelant. **[316]**

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,031.

A. H. BULL & COMPANY, INC., a Corporation,
Libelant,

vs.

THE AMERICAN STEAM TUG "FEARLESS," Her Engines, Boilers, etc.,
Respondent,

SHIPOWNERS AND MERCHANTS' TUGBOAT COMPANY, a Corporation,
Claimant.

Stipulation and Order Regarding Original Exhibits on Appeal.

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto that all exhibits introduced in evidence upon the trial of the above-entitled cause in the District Court may be sent up in connection with the appeal prosecuted herein as original exhibits to the Circuit Court of

Appeals for the Ninth Circuit instead of being copied in the Apostles on Appeal.

PILLSBURY, MADISON AND SUTRO,
Proctors for Libelant.

McCUTCHEN, OLNEY & WILLARD,
Proctors for Claimant and Respondent.

It is so ordered:

FRANK S. DIETRICH,
U. S. District Judge.

Dated August 14th, 1918.

[Endorsed]: Filed Aug. 14, 1918. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. **[317]**

Certificate of Clerk, U. S. District Court, to Apostles on Appeal.

I, Walter B. Maling, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing 317 pages, numbered from 1 to 317, inclusive, contain a full, true and correct transcript of certain records and proceedings, in the case of A. H. Bull & Company, Inc., vs. The American Steam-Tug "Fearless," etc., No. 16,031, as the same now remain on file and of record in the office of the Clerk of said District Court; said transcript having been prepared pursuant to and in accordance with the "Praecipe for Apostles on Appeal" (copy of which is embodied in these Apostles) and the instructions of the Proctors for Respondent and Claimant herein.

I further certify that the cost for preparing and certifying the foregoing Apostles on Appeal is the sum of One Hundred Twenty-two Dollars and

Twenty-five Cents ($122.25) and that the same has been paid to me by the Proctors for the Appellant herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 20th day of August, A. D., 1918.

[Seal] WALTER B. MALING,
Clerk.

By C. M. TAYLOR,
Deputy Clerk. **[318]**

[Endorsed]: No. 3199. United States Circuit Court of Appeals for the Ninth Circuit. Shipowners and Merchants' Tugboat Company, a Corporation, Claimant of the American Steam Tug "Fearless," Her Boilers, Engines, Tackle, Apparel and Furniture, Appellant, vs. A. H. Bull & Company, Inc., a Corporation, Appellee. Apostles on Appeal. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Divison.

Filed August 20, 1918.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 3199,

SHIPOWNERS & MERCHANTS TUGBOAT COMPANY, a Corporation, Owner of the American Steam Tug "FEARLESS," Her Boilers, Engines, Tackle, Apparel and Furniture,

Appellant,

vs.

A. H. BULL & COMPANY, INC.,

Appellee.

Notice of Filing Apostles and Docketing Cause.

To A. H. BULL & COMPANY, INC., and to Messrs. Pillsbury, Madison & Sutro, Its Proctors:

You and each of you will please take notice that on the 20th day of August, 1918, the apostles on appeal in the above-entitled action were filed and the cause docketed in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated Aug. 23, 1918.

McCUTCHEN, OLNEY & WILLARD,
Proctors for Appellant.

Service of the within notice of filing apostles and docketing cause and receipt of a copy is hereby admitted this 23d day of August, 1918.

PILLSBURY, MADISON & SUTRO,
Proctors for Appellee.

[Endorsed]: No. 3199. In the U. S. Circuit Court of Appeals for the Ninth Circuit. Shipowners & Merchants Tugboat Company, etc., Appellant, vs. A. H. Bull & Company, Inc., Appellee. Notice of Filing Apostles and Docketing Cause. Filed Aug. 23, 1918. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

SHIPOWNERS & MERCHANTS TUGBOAT COMPANY, a Corporation, Owners of the American Steam Tug "FEARLESS," Her Boilers, Engines, Tackle, Apparel and Furniture,

Appellants.

vs.

A. H. BULL & COMPANY, INC., a Corporation,

Appellee.

Stipulation and Order Extending Time to June 4, 1918, for Docketing Cause on Appeal.

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto that the time for printing the record and filing and docketing this cause on appeal in the United States Circuit Court of Appeals for the Ninth Circuit may be, and the same is hereby, extended to and including the 4th day of June, 1918.

Dated May 3, 1918.

PILLSBURY, MADISON & SUTRO,
Proctors for Appellee.

IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
Proctors for Appellant.

It is so ordered.

WM. H. HUNT,
Circuit Judge.

Dated May ——, 1918.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals, for the Ninth Circuit. Shipowners & Merchants Tugboat Company, a Corporation, etc., Appellants, vs. A. H. Bull & Company, Inc., a Corporation, Appellee. Stipulation and Order Extending Time for Docketing Cause on Appeal. Filed May 3, 1918. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals, for the Ninth Circuit.

SHIPOWNERS & MERCHANTS TUGBOAT COMPANY, a Corporation, Owner of the American Steam Tug "FEARLESS," Her Boilers, Engines, Tackle, Apparel and Furniture,

Appellants.

vs.

A. H. BULL & COMPANY, INC., a Corporation,
Appellee.

Stipulation and Order Extending Time to June 14, 1918, for Docketing Cause on Appeal.

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto that the time for printing the record and filing and docketing this cause on appeal in the United States Circuit Court of Appeals for the Ninth Circuit may be, and the same is hereby, extended to and including the 14th day of June, 1918.

Dated June 3, 1918.

PILLSBURY, MADISON & SUTRO,
Proctors for Appellee.

McCUTCHEN, OLNEY & WILLARD,
Proctors for Appellant.

It is so ordered.

WM. H. HUNT,
Circuit Judge.

Dated June 3, 1918.

[Endorsed]: No. ——. United States Circuit Court of Appeals, for the Ninth Circuit. Shipowners & Merchants Tugboat Company, a Corporation, Owner of the American Steam Tug "Fearless," Her Boilers, etc., Appellants, vs. A. H. Bull & Company, Inc., a Corporation, Appellee. Stipulation and Order Extending Time for Docketing Cause on Appeal. Filed Jun. 3, 1918. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

SHIPOWNERS & MERCHANTS TUGBOAT COMPANY, a Corporation, Owner of the American Steam Tug "FEARLESS," Her Boilers, Engines, Tackle, Apparel and Furniture,

Appellant,

vs.

A. H. BULL & COMPANY, INC., a Corporation,

Appellee.

Stipulation and Order Extending Time to July 1, 1918, for Docketing Cause on Appeal.

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto that the time for printing the record and filing and docketing this cause on appeal in the United States Circuit Court of Appeals for the Ninth Circuit may be, and the same is hereby, extended to and including the 1st day of July, 1918.

Dated June 13th, 1918.

McCUTCHEN, OLNEY & WILLARD,
Proctors for Appellant.

PILLSBURY, MADISON & SUTRO,
Proctors for Appellee.

It is so ordered.

WM. W. MORROW,
Circuit Judge.

Dated June 14, 1918.

[Endorsed]: No. ——. In the U. S. Circuit Court of Appeals for the Ninth Circuit. Shipowners and Merchants Tugboat Company, a Corporation, Owner of the American Steam Tug "Fearless," etc., Appellant, vs. A. H. Bull & Company, Inc., Appellee. Stipulation and Order Extending Time for Docketing Cause on Appeal. Filed Jun. 14, 1918. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

SHIPOWNERS & MERCHANTS TUGBOAT COMPANY, a Corporation, Owner of the American Steam Tug "FEARLESS," Her Boilers, Engines, Tackle, Apparel and Furniture,

Appellant,

vs.

A. H. BULL & COMPANY, INC., a Corporation,

Appellee.

Stipulation and Order Extending Time to August 1, 1918, for Docketing Cause on Appeal.

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto that the time for printing the record and filing and docketing this cause on appeal in the United States Circuit Court of Appeals for the Ninth Circuit may be, and the same is hereby, extended to and including the 1st day of August, 1918.

Dated June 28, 1918.

McCUTCHEN, OLNEY & WILLARD,
Proctors for Appellant.

PILLSBURY, MADISON & SUTRO,
Proctors for Appellee.

It is so ordered.

WM. H. HUNT,
Circuit Judge.

Dated July ——, 1918.

[Endorsed]: No. ——. In the U. S. Circuit Court of Appeals for the Ninth Circuit. Shipowners & Merchants Tugboat Company, a Corporation, etc., Appellant, vs. A. H. Bull & Company, Inc., a Corporation, Appellee. Stipulation and Order Extending Time for Docketing Cause on Appeal. Filed Jul. 1, 1918. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

SHIPOWNERS & MERCHANTS TUGBOAT COMPANY, a Corporation, Owner of the American Steam Tug "FEARLESS," Her Boilers, Engines, Tackle, Apparel and Furniture,

Appellant,

vs.

A. H. BULL & COMPANY, INC., a Corporation,
Appellee.

Stipulation and Order Extending Time to August 15, 1918, for Docketing Cause on Appeal.

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto that the time for printing the record and filing and docketing this cause on appeal in the United States Circuit Court of Appeals for the Ninth Circuit may be, and the same is hereby, extended to and including the 15th day of August, 1918.

Dated July 31, 1918.

McCUTCHEN, OLNEY & WILLARD,
Proctors for Appellant.
PILLSBURY, MADISON & SUTRO,
Proctors for Appellee.

It is so ordered.

WM. H. HUNT.
JEREMIAH NETERER,
District Judge.

Dated 7/31, 1918.

[Endorsed]: No. ——. In the U. S. Circuit Court of Appeals for the Ninth Circuit. Shipowners & Merchants Tugboat Company, etc., Appellant, vs. A. H. Bull & Company, Inc., Appellee. Stipulation and Order Extending Time for Docketing Cause on Appeal. Filed Jul. 31, 1918. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

SHIPOWNERS & MERCHANTS TUGBOAT COMPANY, a Corporation, Owner of the American Steam Tug "FEARLESS," Her Boilers, Engines, Tackle, Apparel and Furniture,

Appellant,

vs.

A. H. BULL & COMPANY, INC.,

Appellee.

Stipulation and Order Extending Time to August 22, 1918, for Docketing Cause on Appeal.

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto that the time for printing the record and filing and docketing this cause on appeal in the United States Circuit Court of Appeals for the Ninth Circuit may be, and the same is, hereby extended to and including the 22d day of August, 1918.

Dated August 14, 1918.

McCUTCHEN, OLNEY & WILLARD,
Proctors for Appellant.

PILLSBURY, MADISON & SUTRO,
Proctors for Appellee.

It is so ordered.

WM. H. HUNT,
Circuit Judge.

Dated August 15th, 1918.

[Endorsed]: No. ——. In the U. S. Circuit Court of Appeals for the Ninth Circuit. Shipowners & Merchants Tugboat Company, a Corporation, Owner of the American Steam Tug "Fearless," Her Boilers, Engines, Tackle, Apparel and Furniture, Appellant, vs. A. H. Bull & Company, Inc., Appellee. Stipulation and Order Extending Time for Docketing Cause on Appeal. Filed Aug. 15, 1918. F. D. Monckton, Clerk.

[Endorsed]: No. 3199. United States Circuit Court of Appeals for the Ninth Circuit. Six Orders Under Rule 16 Enlarging Time to Aug. 22, 1918, to File Record Thereof and to Docket Cause. Re-filed Aug. 20, 1918. F. D. Monckton, Clerk.